

American University International Law Review

Volume 25 | Issue 3

Article 2

2010

None to Be Trusted: Israel's Use of Cluster Munitions in the Second Lebanon War and the Case for the Convention on Cluster Munitions

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NONE TO BE TRUSTED: ISRAEL'S USE OF CLUSTER MUNITIONS IN THE SECOND LEBANON WAR AND THE CASE FOR THE CONVENTION ON CLUSTER MUNITIONS

EITAN BARAK*

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INTRODUCTION**

In early December 2008, ninety-four states signed the *Convention on Cluster Munitions* ("CCM") in Oslo, Norway.¹ The Convention prohibits the use, development, production, stockpiling, and transfer of Cluster Munitions ("CMs")², defined as "weapon[s] comprising multiple explosive submunitions [(i.e., bomblets)] which are dispensed from a container."³

** The *American University International Law Review* would like to thank Aliyah M. Philips, American University Washington College of Law, J.D. Candidate 2012, for her assistance with the Hebrew language sources in this article.

1. Convention on Cluster Munitions, Convention on Cluster Munitions Signing Conference, http://www.clusterconvention.org/pages/pages_iv/iv_signing_conferece.html (last visited May 9, 2010). For a complete list of all signatories, see Convention on Cluster Munitions, Ratifications and Signatures, http://www.clusterconvention.org/pages/pages_i/i_statessigning.html (last visited May 9, 2010).

2. See Convention on Cluster Munitions art. 1, *opened for signature* Dec. 3, 2008, Doc. No. CCM/77, *available at* <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf> [hereinafter CCM] (listing the general obligations of signatories regarding cluster munitions). See generally Priya Pillai, *Adoption of the Convention on Cluster Munitions*, ASIL INSIGHT, Oct. 1, 2008, <http://www.asil.org/insights081001.cfm> (providing a brief overview of the convention's provisions).

3. Nout van Woudenberg, *The Long and Winding Road Towards an Instrument on Cluster Munitions*, 12 J. CONFLICT & SECURITY L. 447, 451 (2007) (defining submunitions as "munition[s] designed to be dispensed in multiple quantities from a container and to detonate prior to, on, or after impact," and discussing additional variations of the definition of CM in the absence of the standard definition.); see also Convention on Cluster Munitions, *supra* note 2, art. 2(2) ("'Cluster munition' means a conventional munition that is designed to disperse or release explosive submunitions.").

The Convention, which will enter into force on August 15, 2010 following the ratification of thirty countries by mid-February 2010, is the culmination of the “Oslo Process,” under whose heading five conferences were held between February 2007 (Oslo, Norway) and May 2008 (Dublin, Ireland).⁴ While only forty-six states originally agreed to launch the process and endorse the Oslo Declaration at the first conference in February 2007,⁵ 107 states ultimately adopted the CCM at the last conference held in Dublin.⁶ Such agreement apparently reflects a dramatic rise in the number of states believing that the only guarantee for the prevention of the next humanitarian crisis inflicted by this weapon is its total elimination.⁷ As Germany’s Foreign Minister Walter Steinmeier and the British Foreign Secretary David Miliband wrote, the CCM “is one of the most significant developments in the area of conventional arms control,” through which “[w]e will be banning an entire category of weapons.”⁸

4. Convention on Cluster Munitions, Oslo Process, http://www.clusterconvention.org/pages/pages_vi/vib_osloprocess.html (last visited May 9, 2010) (naming the locations of the other three conferences as Lima, Peru (May 2007), Vienna, Austria (December 2007), and Wellington, New Zealand (February 2008), and noting that there were also a number of regional meetings leading up to the convention).

5. *Id.* At this meeting, the states committed to conclude an international instrument by 2008 that, inter alia, prohibits the production and use of CMs and establishes a framework for stockpile destruction. Declaration, Oslo Conf. on Cluster Munitions, ¶ 1, (Feb. 23, 2007), available at <http://www.clusterconvention.org/downloadablefiles/Oslo%20DeclarationFeb07.pdf>.

6. Convention on Cluster Munitions, States Adopting the Convention on Cluster Munitions, http://www.clusterconvention.org/pages/pages_i/i_statesadopting.html (last visited May 9, 2010).

7. *Cf.* Dept. of Foreign Aff., Dublin Diplomatic Conference on Cluster Munitions, <http://www.clustermunitionsdublin.ie/> (last updated Nov. 21, 2008) (describing the Minister of Foreign Affairs’ view of the participation in and the reasoning for the convention). For a detailed overview and a personnel account of this conference, see John Borrie, *How the Cluster Munition Ban Was Won: Oslo Treaty Negotiations Conclude in Dublin*, DISARMAMENT DIPL., Summer 2008, available at <http://www.acronym.org.uk/dd/dd88/88jb.htm> [hereinafter Borrie, *How the Cluster Munition Ban Was Won*], and *The Road from Oslo: Emerging International Efforts on Cluster Munitions*, DISARMAMENT DIPL., Summer 2007, available at <http://www.acronym.org.uk/dd/dd85/85olso.htm> [hereinafter Borrie, *The Road from Oslo*]. For the most comprehensive and updated overview of the entire Oslo Process, see JOHN BORRIE, UNACCEPTABLE HARM: A HISTORY OF HOW THE TREATY TO BAN CLUSTER MUNITIONS WAS WON (United Nations 2009).

8. David Miliband & Frank Walter Steinmeier, *Towards a Safer World*, GUARDIAN, Dec. 2, 2008, available at <http://www.guardian.co.uk/commentis>

Yet, in that same year, 2007, another multilateral process emerged over the issue of CMs; rather than *ban* CMs, the process's final goal was to *regulate* CMs—with all that entailed.⁹ In the face of the international outcry on the absence of any legal restrictions on CMs whatsoever,¹⁰ many major CM stockpilers and users continue to assert that various restrictions could adequately address the need to dramatically minimize the likely post-conflict harm associated with such weapons.

According to its proponents, regulation should be accomplished through a set of legally binding restrictions issued under the auspices of the 1980 U.N. Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (“CCW”).¹¹ This convention constituted a framework for the separate protocols

free/2008/dec/02/weaponstechnology-armstrade.

9. See Van Woudenburg, *supra* note 3, at 474 (detailing the proposal in the Conventional Weapons Convention (“CCW”) by Germany for Protocol VI regarding regulation of cluster munitions, which called for new standards, clear restrictions, and ultimately the “replacement of present-day cluster munitions by a new generation of area target munitions”). See generally MICHAEL MANDELBAUM, THE NUCLEAR REVOLUTION: INTERNATIONAL POLITICS BEFORE AND AFTER HIROSHIMA 33-34 (1981) (describing classification issues regarding the regulation of nuclear weapons as an analogy for the possible implications of the evolving cultural restraints on the use of CMs); BRIAN RAPPERT, CONTROLLING THE WEAPONS OF WAR: POLITICS, PERSUASION, AND THE PROHIBITION OF INHUMANITY 123-36 (2006) (analyzing issues that prohibition on weapons may cause, particularly in the area of classification).

10. See, e.g., *Hard Fought Landmine Victory Faces New Threat*, BIRMINGHAM POST, Sept. 19, 2007, at 11 (describing the need for an international regulation of cluster munitions due to their popularity as weapons and their potential for deadly destruction).

11. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter CCW]. The treaty entered into full force Dec. 2, 1983, and as of May 2010, there were 111 parties to the CCW, some of which have not ratified all the protocols, and five signatories. See, e.g., Peter Kolarov, CCW Secretariat, U.N. Office for Disarmament Aff., The Convention on Prohibitions or Restriction on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), presented at U.N. Regional Seminar on Promoting the Universality of the Convention on Certain Conventional Weapons (CCW) and its Annexed Protocols in South Asia, Southeast Asia and South Pacific (UNRC PD) (Dec. 17-18, 2008) (detailing the number of states that have signed on to the various protocols of the CCW).

formulated regarding conventional weapons; as such, it is confined to general provisions (e.g., its entry into force or scope)). It currently comprises three initial protocols and two which were adopted later: (I) Non-Detectable Fragments (by X-rays),¹² (II) Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (amended in 1996),¹³ (III) Prohibitions or Restrictions on the Use of Incendiary Weapons,¹⁴ (IV) Protocol on Blinding Laser Weapons (adopted in 1995),¹⁵ and (V) Protocol on Explosive Remnants of War (“ERW”) (adopted in 2003).¹⁶

A proposed draft text of Protocol VI on CMs (“Draft Protocol”) includes prohibitions and restrictions on storage, destruction, and transfer of CMs between countries but falls far short of the prohibitions contained in the CCM.¹⁷ While no consensus was reached on the Draft Protocol during the five CM sessions held by the expert subsidiary body of the CCW, the Group of Governmental Experts (“GGE”), the CCW States Parties, in their November 2008 annual meeting, decided to continue work into 2009 while setting aside two 2009 GGE sessions to address the CM weapons issue.¹⁸

12. CCW, *supra* note 11, Protocol I.

13. See CCW, *supra* note 11, Protocol II (addressing the restriction of land mines, booby traps and other weapons); see also CCW Protocol on Blinding Laser Weapons (Protocol IV) art. 1, Oct. 13, 1995, 35 I.L.M. 1218 [hereinafter CCW Protocol IV] (amending Protocol II of the CCW).

14. See CCW, *supra* note 11, Protocol III (introducing the protocol for use of incendiary devices and detailing the protection of civilians).

15. CCW Protocol IV, *supra* note 13.

16. Protocol on Explosive Remnants of War, CCW/MSP/2003/3 (Nov. 28, 2003) [hereinafter CCW Protocol V].

17. Group of Governmental Experts of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects [GGE-CCW], *Draft Protocol on Cluster Munitions*, CCW/MSP/2009/WP.1 (Oct. 21, 2009) [hereinafter GGE-CCW, *Draft Protocol on Cluster Munitions*]. For a critical review, article by article, of an earlier slightly modified version (July 2008), see HUM. RTS. WATCH, HUMAN RIGHTS WATCH OBSERVATIONS ON THE CONVENTION ON CONVENTIONAL WEAPONS (CCW) DRAFT PROTOCOL ON CLUSTER MUNITIONS (2008), available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/09/observations-on-ccw-draft-prot-ii-082908.pdf> [hereinafter HUMAN RIGHTS WATCH, OBSERVATIONS].

18. Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report*, ¶ 34, CCW/MSP/2008/4 (Jan. 23, 2009); see also Jeff Abramson, *CCW Fails to*

Nonetheless, no agreed text was completed even in 2009 and in their November 2009 annual meeting, CCW State Parties decided to continue negotiation in 2010.¹⁹

Irrespective of the identity of the conference's participants, the state that served as a catalyst, albeit inadvertently, for bringing CMs to the forefront of the international arena most recently was Israel.²⁰ Despite earlier moves toward banning CMs and the increasing call of some CCW members to address the humanitarian problems associated with the weapon in recent years,²¹ no significant steps were expected to be taken at that time. However, the 2006 Second Lebanon War, in which Israel extensively used CMs,²² prompted states into action.

Naturally, Israel's use of CMs attracted much attention due to the harm done to South Lebanon's civilians, as well as the required clearance and risk-awareness activities.²³ In contrast, the far reaching

Reach Cluster Munitions Pact, ARMS CONTROL TODAY, Dec. 2008, at 48 [hereinafter Abramson, *CCW Fails to Reach Cluster Munitions Pact*] (observing that no consensus was reached in large part due to disagreements between CCM supporters and CCW supporters).

19. After prolonged, futile discussions as to whether the State Parties were negotiating a protocol or merely a proposal for protocol, it was agreed that the GGE "will conclude its negotiations as rapidly as possible and report to the next Meeting of the High Contracting Parties," while two sessions were scheduled for April 12-16, 2010 and August 30-September 3, 2010. See Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report*, ¶ 40, CCW/MSP/2009/5 (Nov. 20, 2009). As to the discussion itself, see Katherine Harrison, Landmine Action Notes on CCW (Nov. 14, 2009) (unpublished Note, on file with author).

20. See, e.g., Isabel Kershner, *Israel Won't Prosecute for Use of Cluster Bombs in Lebanon*, N.Y. TIMES, Dec. 25, 2007, at A4 (reporting on Israel's use of CMs in the 2006 war with Hezbollah garnered the attention of a high ranking United Nations official).

21. See Chris C. Sanders, *Contending With Explosive Remnants of War*, ARMS CONTROL TODAY, Sept. 1, 2004, at 16, 19 (summarizing the concerns of non-governmental organizations with respect to CMs, including "not only . . . unexploded ordnance, but also . . . the direct impact on civilian populations of the cluster bombs that do explode as they can lead to significant civilian casualties").

22. See Wade Boese, *Cluster Munitions Under New Scrutiny*, ARMS CONTROL TODAY, Oct. 1, 2006, at 38 (noting that unexploded CMs continued to harm people even after the official end to the war).

23. See *id.* (detailing the impact of cluster munitions on civilians and the locations of explosive remnants of war, and citing estimates that it would take up

implications of Israel's extensive use of the weapon, rooted mainly in the theoretical dilemma distinguishing an absolute ban on CMs (as advocated in the Oslo Process) from a "relative" ban (as formulated in the CCW process), were neglected.

This oversight was unfortunate given the 2008 release of two important documents: Israel's *Inquiry Commission into the Second Lebanon War* ("Winograd Report"), which reviewed Israel's use of CMs and their legality,²⁴ and Israel Defense Force's ("IDF") Military Advocate General's ("MAG") legal opinion on whether the IDF's extensive use of CM complied with international humanitarian law ("IHL").²⁵

This article is divided into two sections. Part I provides a brief historical record of past failed attempts to ban CMs. It also describes Israel's extensive CM use, as well as the resulting international outcry and its impetus to the CCM's formulation.²⁶ Part II analyzes the Winograd Report and the MAG's legal opinion, from which it gleans seven overlooked lessons regarding CMs' legality, but mainly

to fifteen months to clear the unexploded CMs).

24. See COMM. TO INVESTIGATE THE LEBANON CAMPAIGN IN 2006, THE SECOND LEBANON WAR, FINAL REPORT (2008) [hereinafter WINOGRAD REPORT], available at <http://www.vaadatwino.org.il/reports.html#null>. The unclassified version of the Report was released in January 2008 and is known as the Winograd Commission after its chairman, Justice (Ret.) Dr. Eliyahu Winograd. Other members of the Commission include Law Professor Ruth Gavison, Political Science Professor Yehezkel Dror, and IDF Generals (Reserves) Menachem Einan and Chaim Nadel. It should be noted that in April 2007 the Commission issued a lengthy Interim Report which focuses on other issues. COMM. TO INVESTIGATE THE LEBANON CAMPAIGN IN 2006, THE SECOND LEBANON WAR, INTERIM REPORT (2007), available at <http://www.vaadatwino.org.il/reports.html#null> [hereinafter INTERIM REPORT].

25. See MAG, Brig. Gen. Avihai Mendelblit, Main Points of MAG's Legal Opinion for Inquiring Officer over the Circumstance of Employing Cluster Munitions during the Second Lebanon War, June 18, 2008 (on file with author) [hereinafter MAG's Legal Opinion]. The opinion was written in September 2007 and partially declassified in June 2008. Although it was released on September 6, 2007, the public learned of this important instrument only in December 2007. At the time, the MAG refused to release even an unclassified version despite repeated requests by the Association for Civil Rights in Israel ("ACRI"). Only on June 18, 2008, six months after the ACRI's first appeal on January 9, 2008, was a segment of the document—thirteen out of thirty pages in the classified version—released. Telephone Interview with Adv. Dan Yakir, Chief Legal Counsel, Association for Civil Rights in Israel (July 13, 2008).

26. See *infra* Part I.

the CCM's necessity vis-à-vis *the likely effectiveness of the CMs Draft Protocol* under the CCW.²⁷

As these lessons suggest, none of the restrictions as proposed in the Draft Protocol could ensure that a humanitarian crisis such as that observed in South Lebanon would not recur. On the contrary, as this article suggests, future use of CMs in armed conflicts under the Draft Protocol or any other would-be legal instrument regulating their use may in fact accelerate and/or encourage use. Therefore, when considering the theoretical dilemma pitting the banning model against the regulation model, Israel's experience seems to support the first option. As the 2006 War strongly suggests, when it comes to restraining the use of the CM weapon in a bitter conflict, no state is to be trusted.

I. SETTING: THE SECOND LEBANON WAR AND THE EMERGENCE OF THE CCM

A. PAST ATTEMPTS TO BAN CMs

Contrary to common assumptions, CMs predate not only the Vietnam War, but also WWII.²⁸ Various types of air-dropped CMs, as defined in the CCM,²⁹ were already in use in WWI.³⁰

27. See *infra* Part II.

28. See Woudenberg, *supra* note 3, at 447 (noting that the first CMs were first used by Germany in WWII); see also Alexander Breitegger, Preventing Human Suffering During and After Conflict? The Complementary Case for a Specific Convention on Cluster Munitions, in 10 AUSTRIAN REV. OF INT'L & EUR. L. 3, 7-8 (Gerhard Loibl & Stephan Wittich eds., 2005) (suggesting that past "military excesses" served as catalysts for advancing international law on CMs).

29. CCM, *supra* note 2, art. 2(2). But see Van Woudenberg, *supra* note 3, at 454 (highlighting that there is no uniform definition of cluster munition). For an analysis of the implications of the definition of CMs within the Oslo Negotiations, see Brian Rappert & Richard Moyes, *The Prohibition of Cluster Munitions: Setting International Precedents for Defining Inhumanity*, 16 NONPROLIFERATION REV. 237, 246-47 (2009).

30. See WOLFGANG FLEISCHER, GERMAN AIR-DROPPED WEAPONS TO 1945, at 15, 141 (Ted Oliver trans., 2004) (documenting the specifications of the Splitterbombe SD-2, which was used by the German Air Force as an anti-personnel device and contained either thirty-two or forty-two bombs). See generally Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 234-39 (2001) (providing a succinct overview of the history of cluster munitions).

Nevertheless, as noted by Professor Kalshoven, the Vietnam War, “more than anything else prompted [the international community’s] renewed interest in an almost forgotten topic,” namely the question of banning use of specific weapons.³¹ U.S. use of CMs, which were crowned as “[t]he most indiscriminate and lethal area weapon[s] developed for the Vietnam War,” provoked considerable public opposition.³² In fact, when South Vietnam used CMs (CBU-55) against North Vietnam’s invading army, the latter issued a stern warning and threatened that the army pilots deploying these weapons would be charged with war crimes.³³

When the international community began debating application of prohibitions or restrictions on the use of various conventional weapons in the 1970s, antipersonnel fragmentation CMs were among the few weapons to become the target of proposals for categorical prohibitions under what was to become the CCW.³⁴ However, major

31. FRITS KALSHOVEN, *ARMS, ARMAMENTS AND INTERNATIONAL LAW* 225 (1985).

32. Michael Krepon, *Blanket Coverage: Two Case Studies of Area Weapons in Indochina*, in *THE WORLD MILITARY ORDER: THE IMPACT OF MILITARY TECHNOLOGY ON THE THIRD WORLD* 49, 56 (Mary Kaldor & Asbjørn Eide eds., 1979). See generally ERIC PROKOSCH, *THE TECHNOLOGY OF KILLING: A MILITARY AND POLITICAL HISTORY OF ANTIPERSONNEL WEAPONS*, 83-105 (1995) (providing a historical account of the use of various types of cluster bombs in Vietnam and subsequent investigations). The concern aroused by the weapons’ use is evidenced by the amount of testimony regarding them in the 1967 proceedings before the International War Crimes Tribunal. *Technical Aspects of Fragmentation Bombs Testimony by Jean Pierre Vidier, M.D.*, in *AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL* 249, 249-58 (John Duffett ed., 1968).

33. Antonio Cassese, *Reprisals as a Means of Enforcing the Laws of Warfare* (1977), in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 170 (Antonio Cassese ed., 1980). The warning was issued in April 1975. The North Vietnamese claims were based on the “inhumane” and “indiscriminate” nature of the weapons, which they declared as “contrary to international law” and responsible for terrorizing the civilian population. *Id.* at 161, 172 & n.39.

34. See Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974), U.N. Doc. CDDH/DT/2 (Feb. 21, 1974) (listing the weapons which were the subject of proposals for outright bans). The proposals, which were supported by Egypt, Mexico, Norway, Sweden, Switzerland, Yugoslavia, and Sudan, also included bans against incendiary weapons, multiple flechette weapons, and especially injurious small-caliber projectiles. A slightly amended draft, ultimately supported by sixteen states, was submitted in 1975. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in

military powers, particularly the United States and its allies, opposed any proposal to restrict, let alone ban, the use of CMs.³⁵ The need for consensus with respect to adding a new protocol forestalled acceptance of any meaningful weapons prohibitions and ensured that no restrictions on CMs would apply.³⁶

The concern provoked by subsequent large-scale use of CMs in armed conflicts that attracted international attention, such as the 1999 NATO bombing campaign against the Federal Republic of Yugoslavia,³⁷ was unable to fundamentally change the situation but it was enough to lead to the 2003 adoption of Protocol V to the CCW on ERW. Following the high rate of civilian casualties in Kosovo—mainly from CM duds—the International Committee of the Red Cross (“ICRC”) “called for a moratorium” on CM use “pending the adoption of rules on ERW,” a call which initiated eight years of discussions.³⁸

Armed Conflicts, Vol. XVI, Geneva, Switz., 1974-1977, *Incendiary Weapons*, U.N. Doc. CDDH/IV/201.

35. See Hum. Rts. Watch, *Move by U.S., Others to Support Cluster Munitions Fails*, U.S. FED. NEWS, Sept. 15, 2006, available at <http://www.hrw.org/en/news/2008/11/14/move-us-others-support-cluster-munitions-fails> (reporting that the United States and other countries in fact pushed a protocol that “would allow the use of all existing cluster munitions, including the oldest, most inaccurate, and unreliable varieties, for a period of up to 20 years”).

36. See *id.* (indicating that the CCW operates only by consensus and that about twenty-five countries opposed the draft text).

37. See, e.g., *Hundreds March Against Airstrikes*, WIS. ST. J., Mar. 29, 1999, at 3B (describing protests against the NATO bombings); Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257, 1264-65 (2000) (showing that concern over the bombings was significant enough to require an investigation into pursuing possible prosecution). For criticism on the decision to refrain from investigating possible war crimes (including the attack with CMs on Niš, the third-largest city in Serbia) see Anne-Sophie Massa, *The Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not To Investigate: An Abusive Exercise of Prosecutorial Discretion?*, 24 BERKELEY J. INT'L L. 610, 633 (2006).

38. See Louis Maresca, *A New Protocol on Explosive Remnants of War: The History and Negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons*, 86 INT'L REV. RED CROSS 815, 817-18 (2004) (relating the details of an ICRC study, which found that more civilians died from CMs than from landmines); see also Van Woudenberg, *supra* note 3, 468-76 (tracking the progress of ICRC and CCW discussions on CM regulation).

However, the Protocol on ERW, in force since November 2006, fails to directly address the dangers of CMs; instead, it focuses on post-conflict requirements, and its provisions suffer from an overabundance of ambiguities and weak, qualifying language to the point where few, if any, obligations are binding.³⁹ Furthermore, even during the negotiations, various states as well as international and non-governmental organizations (“NGOs”) did not regard as adequate a protocol dealing only with post-conflict situations.⁴⁰ As such, the ERW problem remains on the agenda with the GGE working according to its original mandate (2003), which mentions CMs only indirectly.⁴¹

Therefore, when the CCW Third Review Conference convened in November 2006, CMs were not on the agenda and it was doubted whether they would attract much attention.⁴² But in the aftermath of the Second Lebanon War, the CM issue—with strong “encouragement from the ICRC”⁴³ as well as the Cluster Munition

39. See Peter Herby & Anna Nuiten, *Explosive Remnants of War: Protecting Civilians through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons*, 83 INT'L REV. RED CROSS 195 (2001) (analyzing Protocol V, which delineates the responsibilities of states to clean up unexploded or abandoned munitions after the end of hostilities).

40. See Van Woudenberg, *supra* note 3, 477 (indicating that the Oslo Initiative was created as a call to stricter regulation of cluster munitions than that which was provided by the CCW's protocol).

41. See Meeting of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Nov. 18-19, 2004, *Report of the Meeting of the States Parties*, at 4, CCW/MSP/2004/2 (Dec. 13, 2004) (stating that the work of the GGE on ERW would continue into 2005); see also Meeting of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Nov. 24-25, 2006, *Report of the Meeting of the States Parties*, at 5, CCW/MSP/2005/2 (Feb. 14, 2006) (stipulating that the work of the GGE on ERW would continue into 2006).

42. See Borrie, *The Road from Oslo*, *supra* note 7, at 46 (describing the lack of attention cluster munition regulation received in the CCW after 2003).

43. *Id.* at 47 (describing cluster munition regulations being the focus after the Lebanon War). The ICRC was shocked by Israel's extensive use of CMs, and the ICRC's Director for International Law and Cooperation, Philip Spoerri, later stated “[the] density of cluster submunition contamination may be unprecedented.” U.N. INST. FOR DISARMAMENT RES., *THE HUMANITARIAN IMPACT OF CLUSTER MUNITIONS* 30 (2008) [hereinafter UNIDIR REPORT].

Coalition (“CMC”)⁴⁴—secured a high place on the agenda. The issue’s importance was well reflected in the then U.N. Secretary General (“UNSG”) Kofi Annan’s call for a “freeze” on CM use in populated areas, together with the destruction of inaccurate and unreliable CMs.⁴⁵ Led by Norway, twenty-five states called to ban CMs “that pose serious humanitarian hazards because they are for example unreliable and/or inaccurate.”⁴⁶ As expected, this declaration did not achieve a consensus. Ultimately, experts convened in June 2007 to further consider the application and implementation of existing IHL “to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions.”⁴⁷

In a June 2007 meeting, Germany submitted a draft Protocol VI on CMs.⁴⁸ Concurrently, the United States, contrary to its traditional policy, declared its willingness to begin negotiations on a Protocol to restrict CM use “but not a ban on the weapons.”⁴⁹ As observers

44. See Cluster Munition Coal., The Problem, <http://www.stopclustermunitions.org/the-problem/> (last visited May 12, 2010). The CMC—a group of around three hundred NGOs from more than eighty countries—was formed after the 2003 Dublin Conference on ERW. It is active in campaigning for a ban on CMs similar to the International Campaign to Ban Landmines (“ICBL”). See *id.* (providing background information on the CMC).

45. Sergei Ordzhonikidze, Director-General, U.N. Office at Geneva, The Secretary General’s Message to Third Review Conference of the Convention on Certain Conventional Weapons, Nov. 7, 2006, available at <http://www.un.org/apps/sg/sgstats.asp?nid=2289>.

46. Third Rev. Conf. of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Nov. 7-17, 2006, *Documents of the Third Review Conference*, at 41, CCW/CONF.III/11 (Part III).

47. Third Rev. Conf. of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Nov. 7-17, 2006, *Final Declaration*, at 6, CCW/CONF.III/11 (Part II).

48. GGE-CCW, June 19-22, 2007, *Draft CCW Protocol on Cluster Munitions*, annex, CCW/GGE/2007/WP.1 (May 1, 2007) (submitted by Germany); see also GGE-CCW, June 19-22, 2007, *Draft CCW Negotiating Mandate on Cluster Munitions*, at ¶ 1, CCW/GGE/2007/WP.3 (June 1, 2007) (submitted by Germany on Behalf of the European Union) (introducing a draft mandate to begin negotiations on Protocol VI).

49. See John Zarocostas, *U.S. Eyes Limits on ‘Cluster’ Weapons; but Refuses Ban on the Bombs*, WASH. TIMES, June 19, 2007, at A11 (noting that the United States had changed its position after an “internal review” and after considering the

speculated, the U.S. change was “intended to prevent mass defections to an ‘Oslo Treaty.’”⁵⁰ At the 2007 CCW States Parties’ annual meeting, a consensus was achieved to “negotiate a proposal to address urgently the humanitarian impact of cluster munitions, while striking a balance between military and humanitarian considerations.”⁵¹ In truth, some major CM users and stockpilers, especially Russia, do not support the proposed Protocol.⁵² Other countries, such as China, India, Israel, and Pakistan, all of which shunned the Oslo Process, shared views similar to Russia’s. However, given the importance that the United States attached to the Protocol, those same states are paying lip service to the Oslo Process.⁵³

Yet, despite five sessions of the GGE held throughout 2008, during which major CM stockpilers, but mainly the United States, worked to gain wide support for drafting a sixth protocol on CMs, states were unable to agree upon the text.⁵⁴ In its subsequent

humanitarian concerns associated with using cluster munitions).

50. See Borrie, *The Road from Oslo*, *supra* note 7, 51-52. As Borrie suggested in another piece, the United States was aware that “it would be politically difficult for supporters of the Oslo Process to appear to reject a CCW negotiating mandate on cluster munitions.” Borrie, *How the Cluster Munition Ban Was Won*, *supra* note 7.

51. Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Nov. 7-13, 2007, *Report*, at 9, CCW/MSP/2007/5 (Dec. 3, 2007).

52. See Miles A. Pomper, *Cluster Munitions Talks Gain Steam*, ARMS CONTROL TODAY, Mar. 2008, at 52 (noting that Russia is reluctant to support the Protocol because it is “too expensive and technologically demanding”).

53. See Borrie, *How the Cluster Munition Ban Was Won*, *supra* note 7, at 51-52 (listing “core” Oslo Process supporters as Austria, the Holy See, Ireland, Mexico, New Zealand, Norway, and Peru); E-mail from John Borrie, Senior Research & Project Manager at the United Nations Institute for Disarmament Research, to Eitan Barak, Professor of Law, The Hebrew University of Jerusalem (Dec. 15, 2008, 21:39 CET) (on file with author); *cf.* Dr. Rodica Radian Gordon, Dir. of Arms Control Dep’t, Israel Ministry of For. Aff., Explanation of the Vote at Convention on Cluster Munitions (L.56), *available at* <http://www.reachingcriticalwill.org/political/1com/1com08/EOV/IsraelL56.pdf> (explaining Israel’s view that the CCW is the best and most promising place to deal with cluster munition regulation).

54. *Cf.* Stephen Mathias, Head of the U.S. Delegation to the Meeting of States Parties to Convention on Certain Conventional Weapons (CCW), U.S. Delegation Statement on the Work of the GGE (Nov. 13, 2008), *available at* <http://geneva.usmission.gov/2008/11/13/gge/> (expressing the disappointment of the

November 2008 annual meeting, the CCW States Parties agreed to continue their negotiations on “proposals,”⁵⁵ while setting aside two 2009 GGE sessions to address CM weapons.⁵⁶

As of mid 2007, as many as thirty-two states were known to have produced more than two hundred different types of CM; furthermore, some seventy-five armies worldwide include this weapon in their arsenals.⁵⁷ Therefore, as the chairman of the GGE on CMs commented: “I hope that everybody will keep in mind that 90 percent of world stockpiles are not covered by the CCM.”⁵⁸

Indeed, as statements from countries attending the Dublin conference and/or the Oslo signing conference show, some states have already begun to remove CMs from service.⁵⁹ Yet, the challenge the CCM faces vis-à-vis achievement of universal

U.S. delegation regarding the lack of consensus on the new protocol).

55. See Abramson, *CCW Fails to Reach Cluster Munitions Pact*, *supra* note 18, at 48 (“Russia objected to using the word ‘protocol’ if . . . work were to continue.”).

56. See Posting of John Borrie to Disarmament Insight, *CCW: The Wailing Wall* (Nov. 7, 2008, 15:15 EST), <http://disarmamentinsight.blogspot.com/2008/11/ccw-wailing-wall.html> (reporting that 25 CCW State Parties, mainly strong supporters of the Oslo Process, issued a joint statement concerning opposition to the protocol). *But see* Stephen Mathias, *U.S. Delegation Statement on Proposed Changes by Group of 25*, Nov. 7, 2008, available at <http://www.us-mission.ch/ccw/statements/1107Group25.html> (reiterating U.S. opposition to a complete ban on CMs); *see also* Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report*, ¶ 34, CCW/MSP/2008/4 (Jan. 23, 2009) (reporting the final decision).

57. See Women’s Int’l League for Peace and Freedom, *32 Countries that Produce Cluster Munitions*, <http://www.wilpf.int.ch/disarmament/clustermunitions/producers.html> (last updated Nov. 2007) (listing countries that have produced cluster munitions); *see also* Hum. Rts. Watch, *A Dirty Dozen Cluster Munitions*, <http://www.hrw.org/legacy/campaigns/clusters/chart/> (last visited May 13, 2010) (listing stockpiling countries).

58. Jeff Abramson, *CCW Considers Limits on Cluster Munitions*, ARMS CONTROL TODAY, Oct. 2008, at 43 [hereinafter Abramson, *CCW Considers Limits on Cluster Munitions*]. (failing to give any evidential basis for the high figure).

59. See, e.g., Frank-Walter Steinmeier, Fed. Minister for For. Aff., Speech at the Signing Conference of the Convention on Cluster Munitions in Oslo (Mar. 12, 2008) (stating that Germany had decided to destroy its cluster munitions prior to the conference); Maxime Verhagen, Minister of For. Aff., Speech at Signing Conference, Convention on Cluster Munitions, Oslo (Dec. 3, 2008) (indicating that the Netherlands had already begun destruction of its cluster munitions).

adherence is far more challenging than the one faced by its predecessor, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel (“AP”) Mines and on their Destruction (“Ottawa Convention”).⁶⁰ Unlike AP mines, CMs are perceived by modern militaries as an effective and indispensable weapon.⁶¹ Indeed, as stated U.S. Secretary of Defense Robert Gates when announcing a new U.S. policy on CMs in June 2008, “[c]luster munitions are legitimate weapons with clear military utility. They are effective weapons, provide distinct advantages against a range of targets . . . and are an integral part of U.S. forces capabilities.”⁶²

B. ISRAEL’S EXTENSIVE USE OF CMs

Given the 2006 Second Lebanon War’s limited geographical boundaries and short duration (34 days), Israel fired an unprecedented quantity of CMs.⁶³ In addition to the small-scale use of indigenous M85 bomblets,⁶⁴ there was extensive use of U.S.-made

60. United Nations: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sep. 18, 1997, 2056 U.N.T.S. 211, 36 I.L.M. 1507.

61. Cf. Robert G. Gard, Jr., *The Military Utility of Anti-Personnel Mines*, in *TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES* 136, 138-54 (Maxwell A. Cameron et al. eds., 1999) (providing information on the limited military utility attributed to AP mines and their banning, but acknowledging that many states have an interest in continuing to use them).

62. Memorandum from the Sec’y of Defense to the Secretaries of the Military Depts. et al. (June 19, 2008). In principle, the new policy sets the goal of using CMs with less than one percent HDR within the next ten years. *See id.* (indicating the time frame and policy for the Department of Defense concerning HDR).

63. *See generally* HUM. RTS. WATCH, FLOODING SOUTH LEBANON: ISRAEL’S USE OF CLUSTER MUNITIONS IN LEBANON IN JULY AND AUGUST 2006 (2008) [hereinafter HUM. RTS. WATCH, FLOODING SOUTH LEBANON] (analyzing the use of cluster munitions by Israel and the impact they had on Lebanon and its people).

64. *See id.* at 32 (describing the types of cluster munitions used by Israel in the Lebanon War). Each M395 and M396 155mm artillery shell contains and delivers sixty-three and forty-nine M85 bomblets, respectively. *Id.* at 30. Additionally, some 130 Israeli-made Trajectory Correction System (“TCS”) rockets were first operational in this war. *Id.* at 32; *see also* Press Release, Israel Mil. Industries, IMI’s Trajectory Corrected Rocket Operated and Combat Proven in the 2nd Lebanon War (May 15, 2007) (describing the TCS rocket’s capabilities and the use by Israel during the war). The TCS rockets have a content of 644 M77 bomblets. Data presented to the author at the IMI exhibit marking Israel’s 60th anniversary, Rishon LeZion, Sept. 16-23, 2008; *see also* Amnon Barzilai, *A Precise Rocket for*

CMs, delivered by U.S.-made 155mm artillery shells, Multiple Launch Rocket System's ("MLRS") M26 rockets, and—albeit on a limited scale—Vietnam-era aerially delivered CBU-58B bombs.⁶⁵ As more than 1,800 rockets were fired on Lebanon—each rocket containing 644 bomblets—more than 1.2 million cluster bombs were dispersed from this weapon system alone.⁶⁶ According to official reports, the MLRS bomblets' high dynamic range's ("HDR") ranges from 5% – 23%, implying that between 58,000 to 253,000 MLRS bomblets failed in Southern Lebanon.⁶⁷ Given the official failure rate of 3% – 14%, artillery-delivered CMs and a careful estimate of the number of U.S.-made shells used, the conclusion to be reached is that some additional 21,000 failed bomblets are expected to be found somewhere in Lebanon.⁶⁸

40 km- for the IDF Use, HAARETZ, Aug. 17, 2004, at 6. Haaretz has published a concise English-language edition (also available online) as of September 1997. Citations were taken from this source whenever possible to avoid translation errors. Unless otherwise indicated, Hebrew sources were translated by the author.

65. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 28-32 (describing the types of cluster munitions used by Israel that were partially made by the United States). No exact data are available for the number of air-dropped CMs (CBU-58B with 650 bomblets each) used, but as of mid-January 2008, 28,136 duds BLU-63 bomblets from the 2006 War were found; these constitute 20% of the total number of duds destroyed by the deminers. *Id.* at 32.

66. Meron Rapoport, *When Rockets and Phosphorous Cluster*, HAARETZ, Sep. 13, 2006, available at <http://www.haaretz.com/hasen/spages/761910.html>; see also AMIR RAPAPORT, FRIENDLY FIRE 344 (2007).

67. See HUM. RTS. WATCH, CLUSTER MUNITIONS QUESTIONS AND ANSWERS: THE M26 ROCKET (2006), <http://www.hrw.org/english/docs/2006/08/18/global14050.htm> (providing a general overview of M26 rocket use in Lebanon). However, while the Human Rights Watch report cites official reports according to which the HDR is as high as 16%, some U.S. official reports note significantly higher HDRs. See, e.g., U.S. GEN. ACCT. OFF. [GAO], OPERATION DESERT STORM: CASUALTIES CAUSED BY IMPROPER HANDLING OF UNEXPLODED U.S. SUBMUNITIONS 4 (1993) (relaying an HDR rate as high as 23%).

68. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 29 & n.66 (aggregating data on failure rates from the Office of the Under Secretary of Defense, the U.S. Army Defense Ammunition Center, and the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics). Although no official data are available, relying on artilleryists' eyewitness accounts, it is clear that no more than five percent of the used shells delivered CMs (i.e., some 8,500 shells) from which a small part (assuming some 2,500 shells) were Israeli-made shells having a lower number of bomblets (each U.S.-made artillery shell contains 88 bomblets). As such, up to 685,500 bomblets were delivered by artillery shells. See Hanan Greenberg, *IDF: Use of Cluster Bombs During War Legal*,

In sum, even given the HDR's lowest estimates of all CMs in use, the IDF commanders who executed the firing of these munitions *knew in advance that* a total of 79,000 duds *would remain on Lebanese soil*.⁶⁹ However, low official HDRs, as acknowledged by the Winograd Commission,⁷⁰ were proven to be unreliable. Therefore, the actual number of duds in South Lebanon is much higher and reflected in the high number of duds found so far as compared to the maximum number of 79,000 duds expected according to the official HDRs.⁷¹ This number is, of course, far from the million duds (among four million used bomblets) estimated by the United Nations.⁷² As the U.S. State Department rightly pointed

YNETNEWS.COM, Dec. 24, 2007, <http://www.ynetnews.com/articles/0,7340,L-3486267,00.html>.

69. The number of duds to be expected from the aerially delivered CM BLU-63 bomblets, which have a declared HDR of five percent, is excluded from our calculation. Nonetheless, the fact that the some 2,500 Israeli-made shells have fewer bomblets offsets this exclusion.

70. *See infra*, Part II, Lesson 1.

71. *Cf.* GENEVA INT'L CTR. FOR HUMANITARIAN DEMINING, GUIDE TO CLUSTER MUNITIONS 20 (2d ed. 2009) (indicating that as of December 2008, a total number of 153,755 duds had been found in Lebanon). However, the actual figure is higher, as no figures contain accurate estimates of the large numbers of unexploded sub-munitions cleared by local villagers or during undocumented emergency clearance by the Lebanese Armed Forces ("LAF") and the U.N. Interim Force in Lebanon ("UNIFIL"), conducted after large numbers of sub-munitions were found on in populated areas. *Cf.* HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 82-90 (describing the cleanup efforts of failed submunitions in Lebanon).

72. *See, e.g.*, Michael Slackman, *Israeli Bomblets Plague Lebanon*, N.Y. TIMES, Oct. 6, 2006, at A1 ("[S]outhern Lebanon is littered with one million unexploded bomblets, far outnumbering the 650,000 people living in the region."). The estimate was provided by MAAC-SL, which had relied on a press report stating that 160,000 shells were fired and that an estimated 10%–20% of these (i.e., 16,000 to 32,000 shells) delivered U.S.-made CMs. Hence, a total of approximately 1.4 to 2.8 million bomblets were fired by Israel. *See* U.N. MINE ACTION COORDINATION CTR., SOUTH LEBANON CLUSTER BOMB INFORMATION SHEET 2, *available at* http://www.reliefweb.int/rw/rwb.nsf/retrieveattachments?openagent&shortid=EKOI-74B5B5&file=Full_Report.pdf (providing data on the amount of unexploded cluster munitions). To those figures, the U.N. Mine Action Coordination Center South Lebanon ("MAAC-SL") added the 1,159,200 MLRS bomblets. *Id.*; *see also* HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 37 (providing a reproduction of this calculation by NGOs dated as late as January 2008).

out, given the rate of clearance, the actual number of duds found does not support such a high estimate.⁷³

C. THE INTERNATIONAL OUTCRY AND THE CCM'S EMERGENCE

Although few accusations appeared in the international media claiming Israel's use of CMs was illegal⁷⁴ amidst the intense fighting, the world's outcry was raised in the war's aftermath; Israel suddenly found itself under heavy attack.⁷⁵ Israel was publicly condemned even by then UNSG Annan, while then Humanitarian Affairs and Emergency Relief Coordinator, Under-Secretary-General Jan Egeland, Annan's aide, chose to focus his criticism on the fact that "90 percent of the cluster bomb strikes occurred in the last 72 hours of the conflict, when we knew there would be a resolution."⁷⁶ Israel's

73. See U.S. Dep't of State, Bureau of Pol.-Mil. Aff., White Paper: Putting the Impact of Cluster Munitions in Context with the Effects of All Explosive Remnants of War, Fact Sheet (Feb. 15, 2008), available at <http://useu.usmission.gov/Article.asp?ID=36f73dda-59a2-4755-9f50-a2e006592343> [hereinafter U.S. White Paper] (providing results of U.S. efforts to destroy conventional munitions in other countries). However, it was stressed that this should not be construed as stating that the duds did not "create[] a significant humanitarian impact in southern Lebanon." *Id.*

74. But see Press Release, Human Rts. Watch, Israeli Cluster Munitions Hit Civilians in Lebanon: Israel Must Not Use Indiscriminate Weapons (July 24, 2006), http://hrw.org/english/docs/2006/07/24/isrlpa13798_txt.htm (opining that cluster munitions violate international humanitarian law); Robert Pear, *Rally Near White House Protests Violence in Mideast*, N.Y. TIMES, Aug. 13, 2006, at A22 (detailing protests in the United States in reaction to Israel's bombing of Lebanon).

75. See Marvin Kalb & Carol Saivetz, *The Israeli-Hezbollah War of 2006: The Media as a Weapon in Asymmetrical Conflict*, 12 HARV. INT'L J. PRESS/POL., Summer 2007, at 43, 50-51 (describing views of both the news media and the public as highly critical of Israel's bombing of Lebanon). This was part of a general trend among leading U.S. newspaper pages, the front pages of which "Israel was portrayed as the aggressor." *Id.* at 51 (comparing the view of common newspapers towards Israel with their view of Hezbollah).

76. See THOMAS NASH, FORESEEABLE HARM: THE USE AND IMPACT OF CLUSTER MUNITIONS IN LEBANON 3 (2006) (quoting Egeland as describing Israel's use of CMs as "shocking and "completely immoral"). This information led many Lebanese to believe that Israel's intention was "to litter the south with unexploded cluster bombs as a strategy to keep people from returning right away." Slackman, *supra* note 72; see also, e.g., Yoav Stern, *Annan Condemns IDF Use of Cluster Bombs*, HAARETZ, Sept. 1, 2006, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=757515&contrassID=2&subContrassID=1&sbSubContrassID=0> (last visited Oct. 10, 2009) (criticizing IDF policy); Todd Pitman,

actions likewise drew heavy criticism in the four U.N. Human Rights Council (“UNHRC”) Rapporteurs’ report following their fact-finding mission to Lebanon and Israel in September 2006.⁷⁷ The report led the Human Rights Council to establish a special U.N. Commission of Inquiry (“COI”) to investigate violations of human rights and humanitarian law by Israel, which produced the Report of November 2006, which in turn reinforced and intensified that criticism.⁷⁸ Most importantly, as both reports concluded, the international community should take “urgent action to add cluster munitions to the list of weapons banned under international law.”⁷⁹

Naturally, the harm to South Lebanon’s civilians as well as the required clearance and risk awareness activities attracted much attention by NGOs such as Human Rights Watch (“HRW”) and Landmine Action.⁸⁰ Their reports, which were issued mainly by the

Unexploded Israeli bombs Menace Lebanese, FOX NEWS, Aug. 31, 2006, http://www.foxnews.com/printer_friendly_wires/2006Aug31/0,4675,MideastClusterBombsLH1,00.html (describing the outcry of officials over the use of the bombs by Israel but indicating they were not used illegally); cf. Michael L. Gross, *The Second Lebanon War: The Question of Proportionality and the Prospect of Non-Lethal Warfare*, 7 J. MIL. ETHICS 1 (2008) (analyzing the effect that Israel’s strike at the end of the war had on the proportionality question).

77. See *Mission to Lebanon and Israel, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin, and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, delivered to the U.N. Hum. Rts. Council*, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006) [hereinafter UNHRC Report]. After criticizing Israel’s extensive use of CMs and raising doubts over their military necessity, the U.N. Rapporteurs noted that “[i]f proven, the widely reported claim . . . would indicate an intention to inhibit and prevent the return of civilians and a reckless disregard for the predictable civilian casualties that have occurred.” *Id.* at 10, 13, 25.

78. See *id.* at 58-60 (criticizing Israel’s extensive and unnecessary use of the cluster munition).

79. UNHRC REPORT, *supra* note 77, at 24-25.

80. See, e.g., NASH, *supra* note 76, at 34 (documenting the involvement of the MACC-SL and the Mine Advisory Group); HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63; GREG CROWTHER, COUNTING THE COST: THE ECONOMIC IMPACT OF CLUSTER MUNITION CONTAMINATION IN LEBANON (2008) (providing Landmine Action’s report on the economic consequences of the cluster munition use by Israel); see also UNIDIR REPORT, *supra* note 43; CATHY SULTAN, TRAGEDY IN SOUTH LEBANON: THE ISRAELI-HEZBOLLAH WAR OF 2006 59-72

NGOs participating in the CMC as of 2006, have helped sustain the problematic implications in the public mind associated with CM use in the 2006 War.⁸¹

Therefore, in spite of earlier developments toward banning CMs, including domestic measures such as the February 2006 Belgium National Legislation prohibiting CM manufacture, trade, and deployment,⁸²—the first of its kind internationally—for many experts and CMC activists, Israel's use ensured that the campaign to ban CMs would receive universal support.⁸³ Even those experts and CMC activists who refused to perceive this use *sine qua non* for the CCM's emergence admit it was crucial for creating the strong convention, signed by many countries.⁸⁴ As Jonas Gahr Støre, Norway's Foreign Minister clearly stated in October 2006, "[t]he case of Lebanon clearly demonstrates that there is a real need to strengthen humanitarian law in this area This is why Norway will take the lead . . . to put in place an international prohibition against cluster munitions."⁸⁵ Indeed, a month later, when the 2006 CCW Third

(2008) (criticizing Israel's use of cluster munitions in Lebanon).

81. Cf. HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 117 (characterizing cluster munitions as illegal and stating that, in light of the conflict with Lebanon, states should immediately ban their use). As expected, although covering various and different aspects, a rather common trait of them was a harsh criticism on Israel as well as a call for banning CMs or severely restricting their use. For example, as HRW concluded in its February 2008 report, "[t]hese factors lead us to conclude [sic] Israel's attacks were indiscriminate and disproportionate, and thus illegal under international humanitarian law." *Id.*

82. 176 Belgian Bulletin of Acts and Decrees, no. 184, June 9, 2006 (3d ed.). According to Richard Moyes, one of the three Co-Chairs of the CMC, the legislation played a key role in the Oslo Process's emergence by changing the dynamics. E-mail from Richard Moyes, Policy & Research Director at Action on Armed Violence, to Eitan Barak (Dec. 12, 2008) (on file with author).

83. Cf. Walter Gibbs & Kirk Semple, *Afghanistan Agrees to Sign Bomb Treaty*, N.Y. TIMES, Dec. 4, 2008, at A17 (describing Israel's positive effect on convincing states to sign the cluster munitions treaty, focusing specifically on Afghanistan). As the 1997 Nobel peace Laureate Jody Williams said during the Oslo Signing Ceremony: "Quite frankly, if Israel hadn't done that, we might not have a cluster treaty today." *Id.*

84. As prominent CMC activists (e.g., two of its co-chairs, Moyes and HRW's Arms Division Director Steve Goose summed it up, Lebanon was "necessary, but not sufficient," emphasizing that multilateral processes were already underway. See E-mail from Richard Moyes, *supra* note 82; E-mail from John Borrie, *supra* note 53.

85. Gibbs & Semple, *supra* note 83; see also J. Gahr Store, *Cluster Munitions*,

Review Conference convened, Norway attempted to ban CMs under this framework. Once realizing, however, that its attempts are doomed to failure, much to the U.S.'s displeasure,⁸⁶ Støre announced Norway's intention to organize a conference for like-minded governments seeking to ban CMs.⁸⁷ From this point, the road to the Signing Conference was unavoidable.

II: THE WINOGRAD REPORT, THE IDF MAG'S LEGAL OPINION AND THE CASE FOR THE CCM

On September 26, 2006, nine days after the Winograd Commission was appointed by the Israeli Government in response to massive domestic pressures "[t]o look into the preparation and conduct of the political and the security levels concerning all the dimensions of the Northern Campaign which started on July 12, 2006,"⁸⁸ the Association for Civil Rights in Israel ("ACRI") requested assurance that "the committee's mandate include an investigation of alleged grave violations of humanitarian law," including the use of CMs "in the heart of built-up areas."⁸⁹ Such a practice, the ACRI stated in its appeal, "represents a blatant violation of humanitarian law, both because this weaponry cannot be

4 DISARMAMENT FORUM 3, 3 (2006) (indicating his view that cluster munitions should be banned via legally binding regulations).

86. Stephen D. Goose, *Cluster Munitions: Ban Them*, ARMS CONTROL TODAY, Jan.-Feb. 2008, at 6, 6, 8 (stating that Norway led a process to ban cluster munitions, and summarizing the U.S. opposition to a possible ban on CMs); U.S. White Paper, *supra* note 73 (supporting the CCW Protocol V and encouraging other states to support the Protocol, as well); Doug Tuttle, *U.S. Cluster Munitions Policy*, CTR. FOR DEF. INFO., Feb. 22, 2008, <http://www.cdi.org/program/document.cfm?DocumentID=4216> ("In [its White Paper], the United States clearly outlines its unwillingness to join the international effort to ban cluster bombs.").

87. Associated Press, *Norway Leads Move to Ban Cluster Bombs Despite Objections of U.S.*, FOX NEWS, Nov. 17, 2006, <http://www.foxnews.com/story/0,2933,230278,00.html>.

88. See WINOGRAD REPORT, *supra* note 24, at 35, ¶ 14. The commission was appointed under Basic Law: The Government, 2001, § 7(a) (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm (last visited May 14, 2010) (designating to a Knesset Member the power to form the government body).

89. Letter from Dan Yakir, ACRI Chief Legal Counsel & Sonia Boulos, Attorney, to Dr. Eliyahu Winograd, Head of the Government Appointed Investigative Committee, Prime Minister's Office (Sep. 25, 2006), available at <http://www.acri.org.il/eng/print.aspx?id=340>.

accurately aimed at concrete military targets, and because these explosive devices, in practice, turn the targeted territory into a minefield that endangers the civilian population.”⁹⁰

In July 2007 and in response to a second appeal, Justice Winograd announced that “the panel’s final report [will] examine the war’s [compliance with] . . . international law.”⁹¹ On January 30, 2008, the Committee submitted its final report, which indeed included a chapter on Israel’s compliance with international law, including a special six-page appendix on the use of CMs.⁹²

Given its status as a governmental investigation commission, it was obvious that Winograd’s findings would have far reaching implications. Therefore, heavy censorship was imposed to prevent release of any reference to CM use found in its report.⁹³ This step seemed appropriate due to Israel’s diplomatic entanglement with the United States, which still needed to be resolved. The entanglement’s origin was in U.S. suspicions that Israel had violated its legislation as well as a 1976 classified bilateral End-Use Agreement (“1976 Agreement”) (with added assurances and clarifications from April 1978), specifying the conditions for employing U.S.-made CMs.⁹⁴

90. *Id.*

91. See Yuval Azoulay, *Panel to Probe Alleged IDF War Crimes in Second Lebanon War*, HAARETZ, July 27, 2007, available at <http://www.haaretz.com/hasen/spages/885676.html> (noting that Justice Winograd’s announcement was partially in response to calls from Zehava Gal-On, a left-wing member of Knesset for the Meretz-Yahad party, and parents of soldiers for investigation of “ethical misconduct” in regards to Israel’s extensive use of CMs during the war).

92. See WINOGRAD REPORT, *supra* note 24, 481-94 (Ch. 14, Israel’s compliance with International Law), 495-500 (the CMs appendix).

93. Cf. Dan Izenberg, *Winograd Report in English Due Monday*, JERUSALEM POST, Apr. 25, 2007, <http://www.jpost.com/Home/Article.aspx?id=59202> (stating that the Committee would release only a censored summary report to the public, though it presented the full uncensored report to Israeli Prime Minister Ehud Olmert and the Minister of Defense). The Committee had been strongly criticized for failing to release complete and uncensored testimonies from its hearings. *Id.*

94. See David S. Cloud, *Inquiry Opened into Israeli Use of U.S. Bombs*, N.Y. TIMES, Aug. 25, 2006, at A1 (announcing that the U.S. State Department’s Office of Defense Trade Controls Compliance (“DTCC”) launched an inquiry into Israel’s use of U.S.-made CMs in late August 2006). See generally, Eitan Barak, *Doomed to be Violated? The U.S.–Israeli Clandestine End-User Agreement and The Lessons of the Second Lebanon War: Lessons for the Convention on Cluster Munitions*, 38 DENV. J. INT’L L. & POL’Y 1 (2010) (detailing the Israeli-U.S. diplomatic entanglement, its impact on the CCM, the legal implications of Israel’s

The absence of any mention of CMs from the declassified 150-page Interim Report of April 2007 might be justified given its focus on the decision-making preceding the war's outbreak.⁹⁵ The same cannot be said, however, of similar absences from the censored testimony of Israel's Attorney General ("AG") Meni Mazuz and of the MAG before the Committee despite the fact—indicated in the Final Report—that the two were repeatedly questioned on this issue.⁹⁶ Furthermore, whereas other chapters may contain an opening footnote stating that "[t]his chapter was reviewed by the censor," the opening footnote of the special six-page appendix of this massive report, devoted to the issue of CMs, reads: "[p]arts of the unclassified report were deleted from the document."⁹⁷ Needless to say, neither the diplomatic entanglement nor the 1976 Agreement with the United States, are acknowledged.⁹⁸

More importantly, the Commission's decision to refrain from examining individual claims of IHL violations, despite press reports that at least one member (Professor Ruth Gavison) privately defined CM use as a "war crime," suggests that its members well-understood the issue's sensitivity.⁹⁹ As expected, its decision to make do with

alleged violations of U.S. legislation, and the classified 1976 bilateral End-Use Agreement).

95. See INTERIM REPORT, *supra* note 24.

96. For Mendelblit's testimony transcript, published on Dec. 18, 2007, see Brigadier-General Avihai Mendelblit, Testimony before Winograd Commission, <http://www.vaadatwino.org.il/statements.html#null> (last visited May 14, 2010). For a discussion of Mazuz's testimony, see *Mazuz to Winograd: IDF Acted in Accordance with International Law*, YNETNEWS.COM, Dec. 18, 2007, <http://www.ynet.co.il/english/articles/0,7340,L-3484207,00.html>.

97. WINOGRAD REPORT, *supra* note 24, CMs appendix, 495, n. 1. For a different version of the text see, e.g., 481, n.1 (Ch. 14, Israel's compliance with IL).

98. A single implicit reference is to be found: "As aforesaid, limitations on the use of weaponry [i.e. CMs] can be derived from other sources, aside from international law, such as the army's orders or agreements with other countries." See WINOGRAD REPORT, *supra* note 24, at 498, ¶ 13 (emphasis added).

99. According to the report, Professor Gavison was personally informed of the large-scale use of CMs by a MLRS veteran and reacted strongly against those involved. This followed the soldier's testimony that when employing CMs extensively, his battalion's commanders assumed that the MLRS's HDR is 20%. The soldier, however, later sent a formal detailed letter to the Commission but was not invited to testify. The Commission spokesman responded that Prof. Gavison "is not in the habit of commenting on her personal conversations." See Meron Rapoport, *Roger, Over and Out*, HAARETZ, Oct. 19, 2007, at 10 (translated from Hebrew by Caan Rut Avor).

general conclusions—because, in part, “[w]e did not find it appropriate to use the large scale of materials brought to us for this purpose in order to deal with issues that relate to a political and propaganda war against the state”¹⁰⁰—attracted much criticism in Israel and abroad.¹⁰¹ The ACRI, for instance, defined the latter argument as “troubling and repugnant” and called for a non-military independent criminal investigation into the responsibility of those involved in firing CMs at populated areas.¹⁰²

Nonetheless, from a review of the uncensored portions, aided by the MAG’s legal opinion and recently available Israeli sources, seven lessons can be drawn. Taken together, they point to *the salience and need for a new convention, as well as the weaknesses of the CMs Draft Protocol*—should it be put into effect in the future.

LESSON 1: ON THE FEASIBILITY OF NEGLIGIBLE HDR

Undeniably, concern over CM post-conflict duds nurtured international support for the CCM. It seems, therefore, that the United States, a prominent but certainly the most vocal opponent of the CCM, tried to address this concern in its dual attempt to avoid a total ban on CMs.¹⁰³ *First*, in a propagandist manner, it argued that

100. WINOGRAD REPORT, *supra* note 24, at 485.

101. See, e.g., Gideon Levi, *The Lighthouses Have Been Shut Down*, HAARETZ, Feb. 3, 2008, at B1 (illustrating domestic criticism); see also Amnesty Int’l, *Israel: Winograd Commission Disregards Israeli War Crimes*, Jan. 31, 2008, PRE01/032/2008 (presenting Amnesty International’s own research on the number of Lebanese civilians killed during Israeli offensives in order to counter the Commission’s dismissal of the need to investigate serious violations of international humanitarian law); Richard Boudreaux, *Israel Criticized for Cluster Bombs, Panel Questions Adequacy of Controls on Devices’ Use in 2006 Lebanon War*, L.A. TIMES, Feb. 1, 2008, at A8 (outlining national and international criticism for the Commission’s failure to look into allegations that Israel violated international humanitarian law during the war).

102. ACRI, Response Following Publication of the Final Report, Feb. 3, 2008, <http://www.acri.org.il/Story.aspx?id=1678>. The response stressed that “the investigation’s essence as a viable tool in democratic operation is based on the ability to review a matter in depth and thoroughly and not according to it may be perceived in Israel or abroad”. *Id.*

103. See, e.g., Kim Murphy, *Britain Deals a Setback to U.S.; Brown Overrides His Military and Joins in Cluster Bomb Ban*, L.A. TIMES, May 29, 2008, at A1 (quoting U.S. officials’ position to not join any international effort banning CMs but instead to convene a meeting solely of the world’s CM producers and users to discuss controlling their use and proper technological functioning of the weapons).

CMs in fact “constitute a small portion of the total humanitarian threat presented by . . . [conventional unexploded munitions],” and, as the argument goes, no “redundant treaty mechanisms” are needed beyond the existing ones, located in the CCW 1996 Amended Protocol II on *Mines and Booby-Traps* and Protocol V on ERW.¹⁰⁴

The Second Lebanon War suggests a flaw in the U.S. argument. Given the large-scale fire power employed, the use of CMs was quite limited, less than 10% of total projectiles.¹⁰⁵ While any high-explosive shell is a potential dud, one M-26 MLRS Rocket with its 644 M77 bomblets and, according to field tests, a minimum 5% HDR, means at least 32 potential duds.¹⁰⁶ The some 1800 rockets fired were indeed a scant portion of the 173,293 Israeli artillery projectiles and rockets fired;¹⁰⁷ yet, they were, in effect, capable of releasing more than a million bomblets.¹⁰⁸

After the failure of the first method, the *second* U.S. attempt concentrated on a technical solution, i.e., provision of a “new generation” of CMs that left almost no duds.¹⁰⁹ Indeed, the November 2009 Draft Protocol , which accurately reflected the U.S.

104. DOUG TUTTLE, CENTER FOR DISEASE INFORMATION, U.S. CLUSTER MUNITIONS POLICY (2008), <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=4216>; U.S. White Paper, *supra* note 73 (“States need to remain focused on comprehensive post-conflict clearance of *all* explosive hazards, using the lessons that have already been learned from decades of successful humanitarian clearance of landmines.”).

105. *See* HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 46 (citing a study conducted by three Norwegian organizations and a separate study by the MACC-SL on the failure rate of cluster munitions launched by Israel during the war).

106. *See id.* at 30 (referencing reports of the U.S. Office of the Under Secretary of Defense for Acquisition, Technology and Logistics to Congress on the failure rate of cluster munitions).

107. *Id.* at 37 (outlining the factors used by the MACC-SL to estimate the total number of CMs Israel dropped in Lebanon).

108. *Id.* at 37-38 (providing U.N. estimates of the number of dangerous unexploded submunitions based on U.N. calculations of the failure rates of the artillery cluster shells, MLRS rockets, and CBU-58B cluster bombs fired by Israel).

109. *See* Stephen D. Mull, Acting Assistant Sec’y for Pol.-Mil. Aff., On-the-Record Briefing: U.S. Cluster Munitions Policy (May 21, 2008), *available at* <http://geneva.usmission.gov/CD/updates/0521ClusterStephMull.html> (stating that the United States would advocate for solutions that ensured that the cluster munitions used would detonate immediately upon contact with designated military targets rather than later when civilians may be in the area).

position in this case, proposed two alternative technological requirements: (a) that each bomblet possess at least one safeguard (e.g., a self-destruct mechanism) to effectively ensure it “will no longer function as [an] explosive submunition[]”; and (b) incorporation of “a mechanism or design which, after dispersal, results in no more than 1% unexploded ordnance across the range of intended operational environments” (e.g., desert or woody terrain).¹¹⁰

However, this technology already exists, with an advanced type — the M85 bomblet—already tested in a real combat situation (the 2006 Lebanon War).¹¹¹ As expected, its performance in the 2006 War attracted considerable attention among CCM supporters and opponents alike. A sixty-four-page, detailed study, conducted by the Norwegian Defense Research Establishment (“FFI”) and British explosive ordinance experts, found that its HDR actually topped 10%.¹¹² As of June 2007, the Mine Action Co-ordination Centre South Lebanon (“MACC-SL”) has estimated that the M85 HDR, given the number of duds found on the ground after the 2006 War, as “between 5% and 10%.”¹¹³ In contrast, relying on the 2003 use of

110. GGE-CCW, *Draft Protocol on Cluster Munitions*, *supra* note 17, art. 4, ¶ 2; *see also* Stephen Mathias, Head of the U.S. Delegation, Points on Humanitarian Benefit of Draft Protocol (Nov. 6, 2008), *available at* <http://www.ccw-treaty.com/statements/1106HumanitarianBenefit.html> (emphasizing the United States’ strong support for the two alternatives presented by the Chairman of the GGE in its fifth session in November 2008).

111. *See Military Industry*, YEDIOTH AHARANOT (Special Issue), Apr. 26, 2004, at 8 (noting that already by 2004, Israel Military Industries Ltd. (“IMI”), a government-owned weapons manufacturer, successfully produced more than 60 million innovative and highly reliable CMs (M85 dual purpose bomblets with a declared Hazardous Dud Rate (“HDR”) as low as 0.06%). The HDR’s dramatic reduction is achieved by the inclusion of a Self-Destruct Fuse (“SDF”) which is operated once bomblets fail to detonate upon impact.

112. *See* COLIN KING ET AL., *M85: AN ANALYSIS OF RELIABILITY* 15 (Richard Moyes ed., 2007) (acknowledging that detonation tests by M85 manufacturers and military personnel who use them grossly underestimate the actual failure rates of the M85 bomblets in real combat).

113. Chris Clarke, *Unexploded Bombs and Submunitions in South Lebanon: Reliability from a Field Perspective*, in HUMANITARIAN, MILITARY, TECHNICAL AND LEGAL CHALLENGES OF CLUSTER MUNITIONS 41, 42 (2007) (countering the one percent failure rate that military users assert). *But see id.* at 43 (noting the criticism to the five to ten percent failure rate data presented by Mr. Clarke; the criticism consists in that MACC-SL could not have correctly estimated the rate simply based on counting the munitions that MACC-SL found on the ground after the war).

M85 in Iraq by U.K. forces (some 2,000 bombs), Adam Ingram, the U.K.'s Minister of State for Armed Forces, stated in June 2003 that it has a proven maximum failure rate of 2%—an estimate he changed to 5% in November 2006.¹¹⁴ Given such varied estimates, an examination of the Winograd Commission Final Report should prove interesting.

Based on the vast material at its disposal, the Commission refused to accept, *as is*, the declared HDR of the various types of CMs used. Given that, its most important finding concerns the Israeli-made M85 bomblets: Instead of the declared HDR of 0.06%, the Commission estimated the M85 HDR as ranging from 0.5% to 3%!¹¹⁵ In sum, albeit a declared negligible failure rate, it seems that M85 bomblets performed poorly in Southern Lebanon's terrain given their high reputation as the best of their kind.

As the declared HDR was drawn from extensive experimental results, it suggests *a significant gap* between "laboratory conditions" and real-time combat conditions—as already argued by various NGOs.¹¹⁶ More importantly, under the proposed Draft Protocol, employment of a CM weapon is permissible if no significant post-conflict civilian harm is anticipated due to the use of new CMs with a negligible HDR (less than 1 percent).¹¹⁷ However, in the wake of

114. See LANDMINE ACTION, BAN THE "M85" CLUSTER BOMB: FACT-SHEET, *available at* http://www.landmineaction.org/resources/ActionPacks/m85_factsheet.pdf (last visited Oct. 17, 2009) (dismissing U.K. failure rate estimates based on inconsistent statements made by the U.K. between June 2003 and May 2007 on the BL755 and M26 cluster munitions, as well as the lack of tests conducted by the United Kingdom on the CMs during field operations).

115. WINOGRAD REPORT, *supra* note 24, at 495, n. 4.

116. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 45-46, 48 (comparing the 1.3-2.3% failure rate under testing conditions for the self-destructing M85 munitions with the 10% actual failure rate reported by three Norwegian organizations for the M85, and noting the higher failure rates of CMs fired at short-range and in areas where there is dense vegetation or soft ground to "catch" CMs, which would not have been tested); see also Colin King, *Testing Times: Unrealistic Reliability Trials Disguise Cluster Munitions Failure Rates*, 41 JANE'S INT'L DEF. REV. 30, 30-31 (May 2008) (explaining that human error from stress and exhaustion during combat, launching munitions one-by-one in tests versus launching them simultaneously at other times, and cushioning landscapes account for the difference in failure rates during tests than in real situations).

117. See GGE-CCW, *Draft Protocol on Cluster Munitions*, *supra* note 17, art. 4.2(b) (stating that a State Party to the Protocol is prohibited from using,

the 2006 War, this state of affairs appears unfeasible, all the while remembering that this option is considered more effective in ensuring less civilian harm than the first option proposed by the Draft Protocol according to which CM weapons use is permissible once the CM possess at least one effective safeguard, such as a self-destruct or self-neutralization mechanism.¹¹⁸

According to the Draft Protocol, this condition would come into effect only after a long transition period (eight to fifteen years, with an extension option of up to five years in the 2008 draft, to be reduced to eight years with an extension option of up to four years in the 2009 draft) following the Protocol's EIF.¹¹⁹ The Winograd Commission's estimate that the true HDR of the popular U.S.-made CM shells (M42 and M46 bomblets that enjoy an official HDR of five percent) ranges between twelve percent and eighteen percent¹²⁰ suggests that the transition period under the Draft Protocol is highly risky with respect to avoiding a humanitarian crisis due to an extensive use of CMs. Needless to say, no such a transition period exists under the CCM.¹²¹

LESSON 2: THE WORRISOME IMPLICATIONS OF "NEGLIGIBLE HDR"

Some NGOs and CM ban supporters have already expressed the concern that employing CMs with a presumably meaningless HDR may lead to increased use of CMs due to the assumed decrease in

developing, producing, or otherwise acquiring CMs, unless the CM can be "delivered accurately to a pre-defined target area" and is designed to "result in no more than 1% unexploded ordnance" in the area in which the CM is operational).

118. *See id.* art. 4.2(a) (advancing that two other safeguards include ensuring that submunitions have a self-deactivating feature or two or more "initiating mechanisms").

119. *Id.* art. 4.3. *But see* Steve Goose, Co-Chair of the Cluster Munitions Coal., Hum. Rts. Watch, CMC Statement on Article 4, General Prohibitions and Restrictions at the Convention on Conventional Weapons ("CCW") Group of Governmental Experts ("GGE") on Cluster Munitions (Nov. 3, 2008) [hereinafter Goose, CMC Statement] (criticizing the potential thirteen- to twenty-year deferral period as a effectively allowing states to continue to use CMs during the transition period). In my view, the 2009 reduction of the potential deferral period to twelve years makes little difference in this respect.

120. *See* WINOGRAD REPORT, *supra* note 24, at 495, n.4.

121. *See id.* The Commission, however, accepted the M-77 bomblets' 5 percent declared HDR ("MLRS"). *Id.*

post-conflict duds¹²² and, it follows, the intended user's decreased apprehensions. As such, the probable 2.4 percent gap between the would-be user's estimate and the actual results is quite significant.

Considering the Winograd report and the MAG's legal opinion, we must conclude that this unease is realistic. The IDF's inquiry revealed, *in retrospect*, that in only one case were CMs fired into populated Lebanese territory *without any military justification whatsoever, with the incident indeed defined as a deviation by all involved*.¹²³ When reviewing this case, the MAG noted that the commanders who ordered the firing made sure that Israeli-made CMs were used to minimize HDR.¹²⁴ This admission is most alarming as it suggests that once armies are equipped with presumably dud-free CMs, restraints over CM use motivated by post-conflict dud effects are considerably weakened. Apparently, given the declared HDRs of these dud-free CMs, this fear should diminish. However, as suggested earlier, the declared HDRs are far from reliable measures;¹²⁵ as such, increased deployment of CMs may sustain the current level of their large-scale post-conflict harm.

LESSON 3: ON THE EFFECTIVENESS OF NON-VIOLENT PRECAUTIONS

Whereas the post-conflict dud effects are widely discussed in the Winograd Report, there is no equivalent discussion regarding the widespread collateral damage from Israel's extensive use of CMs observed during the fighting. The reason for this is quite simple. Contrary to what one might expect given the magnitude of CM use, the Committee clearly stated: "We should note that we did not hear any claims regarding civilian injuries from cluster bombs during the war."¹²⁶ Indeed, even HRW in its February 2008 comprehensive report counted very few "time of attack casualties" and therefore

122. Goose, CMC Statement, *supra* note 119 (emphasizing the flawed nature of provision 4.2(b) because of the inconsistency in the testing methods used by states to determine failure rates as well as the inaccuracy of testing methods in determining actual failure rates).

123. MAG's Legal Opinion, *supra* note 25, ¶ 20.

124. See *id.*

125. See *supra* note 116 and accompanying text (describing some of the factors that make failure rates unreliable).

126. WINOGRAD REPORT, *supra* note 24, at 497 (emphasis in original).

focused on “civilian harm” in the chapter on post-conflict effects.¹²⁷ Such a surprising gap between large-scale CM use and the marginal collateral damage during its firing requires an explanation, especially because this gap limited, *a priori*, the Committee’s discussion of CMs to their post-conflict effects.

An explanation for this phenomenon, though absent from the Winograd Report itself, is detailed in the MAG’s legal opinion and briefly mentioned in Israel’s formal response to the HRW’s report: Israel issued advance warnings to the local Lebanese residents.¹²⁸ Those warnings—required by Article 57(2)(c) of the 1977 Protocol I to the 1949 Geneva Conventions prescribing that “effective advance warning . . . be given of attacks . . . affect[ing] the civilian population”¹²⁹—were made using various means such as dropping

127. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 52 (recounting stories of civilians who suffered injuries or were killed as a result of submunitions exploding while they were clearing away debris around their homes after the war ended); see also HUM. RTS. WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 80-178, Appendix I (2007) [hereinafter HUM. RTS. WATCH, WHY THEY DIED] (listing civilian casualties during the war from CMs and other weapons, and detailing the circumstances leading to the civilian deaths).

128. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 123-24 (explaining that Israel issued advance warnings to civilians in the form of radio transmissions, leaflet distributions, and via local leaders to evacuate Hezbollah-controlled areas and weapons stores); see also HUM. RTS. WATCH, WHY THEY DIED, *supra* note 127, at 67-68 (reprinting IDF flyers distributed to Lebanese officials and residents south of the Litani River, warning of impending IDF attacks in their areas and instructing them to vacate the area for their own safety).

129. Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, in PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 art. 57 (2) (c) (Int’l Comm. of the Red Cross 1996); see also Prosecutor v. Kupre[ki], Case No. IT-95-16-T, Judgment, ¶ 524 (Jan. 14, 2000) (reinforcing that Articles 57 and 58 of the First Additional Protocol to the 1949 Geneva Conventions constitute customary international law, which binds Israel to compliance with these provisions even though Israel is not party to the First Additional Protocol); Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT, CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 100, 111 (Astrid J. M. Delissen & Gerard J. Tanja, eds., 1991) (asserting that Article 57 of the First Additional Protocol manifests customary international law; whereas, Article 58 could easily gain recognition as customary international law because it contains practices that states would widely follow or feel a sense of legal obligation to follow). But see CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL

leaflet warnings, radio broadcasts,¹³⁰ direct telephone messages to thousands of Lebanese families and, in some cases, direct telephone contact with local Lebanese leaders. Furthermore, “[t]hose warnings were extensively and persistently echoed in the leading Lebanese and Arab media” and, as the MAG concluded, they managed to “convince the residents to leave the area.”¹³¹

Nonetheless, such a mass evacuation should be ascribed to a much more “convincing” means, left unmentioned in both official sources (the Winograd Report and the MAG legal opinion): an organized IDF plan for evacuating 170 villages, employing massive artillery barrages. As recently exposed in one of the IDF’s official journals, “[t]he firing was firstly directed to the villages’ periphery and after a short pause, to their center.”¹³² The fact is, CMs are neither designated to nor capable of harming civilians hiding in bomb shelters.¹³³

Much can be said on the legality of this act, irrespective of its minimal collateral damage in terms of human life. However, for this article’s purposes, other than providing an explanation for the mentioned gap and minimal collateral damage from CM use, this statement is cited to disperse the impression that non-violent

PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2223 (Yves Sandoz et al. eds., 1987) (noting that in cases where “the element of surprise in the attack is a condition of its success,” the provision allows for derogation by including the phrase “unless circumstances do not permit”). See generally *Convention Regarding the Laws and Customs of Land Warfare*, 2 SUPP. AM. J. INT’L L. 90 (1908); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 125-28 (2004) (explaining the requirement that states must take specific actions to avoid civilian casualties while planning a military attack, and its origin in the Hague Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907).

130. See *supra* note 129 and accompanying text (discussing Israeli efforts to warn the civilian population).

131. See MAG’s legal opinion, *supra* note 25, ¶ 11.

132. See Brigadier-General (Reserve) Ya’acov Zigdon, *Much Fire, Little Thinking*, 420-21 MA’ARACHOT [IDF’s official journal], Sept. 2008, at 44.

133. See General Sir Hugh Beach, *Cluster Bombs: The Case for New Controls*, INT’L SECURITY INFO. SERV. EUROPE 13 (Annex C: Alternatives to Cluster Bombs: The British Case) (citing a report claiming that cluster bombs are most effective on penetrating “soft-skinned military vehicles,” rather than thick cement bomb shelters, and distinguishing cluster bombs from anti-tank cluster weapons designed to penetrate heavily-armored tanks).

warnings are sufficient to initiate the mass evacuations necessary to minimize collateral damage in areas designated for CM attacks.

LESSON 4: IHL FLEXIBILITY AND ITS INCAPACITY TO PREVENT FURTHER POST-CONFLICT DISASTERS

On November 19, 2006, the then IDF Chief of Staff Lieutenant-General Dan Halutz, in an unprecedented move, stated that the use of CMs often constituted a *clear violation of his explicit order not to fire into populated zones*.¹³⁴

His announcement was apparently due to the results of an initial IDF "operational inquiry into the use of cluster munitions throughout the Israeli-Lebanese conflict,"¹³⁵ conducted by Brigadier General Michael Ben-Baruch, the IDF's Ground Forces Command, according to Halutz's request. Ben-Baruch's probe had found that while the Israeli Air Force ("IAF") had complied with Halutz's order, the same order was ignored by the Artillery Corps, which fired thousands of cluster bombs "mainly in the War's last days."¹³⁶ More importantly, as part of his announcement, Halutz assigned the Commander of the IDF's Military College, Major General Gershon Ha'cohen, "to look into the implementation of all orders and instructions regarding the use of cluster type munitions, in the course of the conflict."¹³⁷

Ha'cohen's findings, as detailed in the Winograd Final Report and the MAG's legal opinion, in effect provide a favorable picture.

134. See Nir Hason & Meron Rapoport, *Chief of Staff Is to Appoint a Major General to Inquire into Use of Cluster Rockets*, HAARETZ, Nov. 20, 2006, at A1 (reporting Halutz's announcement, which was made on November 19, 2006 via the major Israeli TV channels' evening news programs); Yossi Joshua, *IDF Fired Cluster Bombs Contrary to the Chief of Staff's Order*, YEDIOT AHARONOT, Nov. 20, 2006, at 2 (reporting Halutz's announcement).

135. *Israel Probes Use of Cluster Bombs during War with Hizbollah*, WORLDTRIBUNE.COM, Nov. 22, 2006, http://www.worldtribune.com/worldtribune/WTARC/2006/me_israel_11_21.html (quoting a military statement).

136. Hason & Rapoport, *supra* note 134, at 2.

137. IDF Spokesperson Announcement, Maj. Gen. Ha'cohen Appointed to Inquire the Circumstances of the Use of Cluster Munitions During the Israeli-Lebanese Conflict, Nov. 20, 2006, *available at* <http://thehague.mfa.gov.il/mfm/Data/104928.pdf>; accord Greg Myre, *Israel Orders Investigation of Bomb Use in Lebanon*, N.Y. TIMES, Nov. 21, 2006, at A8 (reporting in the United States on Lieutenant General Halutz's call for an investigation of IDF's use of CMs during the 2006 Lebanon war).

According to both sources, CM use was subjected to three strict limitations: a) proper safety ranges; b) mapped firing zone; and c) the Chief of Staff's approval for each firing.¹³⁸

The story seems simple: an order by the IDF Chief of Staff forbidding CM firings in populated areas did exist.¹³⁹ While IAF use of air-dropped CMs met all three demands, all those involved in cases of artillery-delivered CMs (excluding one which was found deviant by the Northern Command) "acted in this matter according to the instructions and orders given . . . by their supervising headquarters."¹⁴⁰ The one exception was the Wartime Officer in Command ("O.C."), the Northern Command, Major General (Reserve) Udi Adam, with respect to whom, the MAG noted, "some flaws were found in his actions."¹⁴¹ Given the *circumstances*, however, the MAG decided that "there is no room at present for disciplinary or other measures against the [Northern] Command's O.C."¹⁴² While Adam's "few flaws" were not detailed, the absence of any legal action taken against him was explained by the MAG as follows: (a) Adam had already resigned his post and left the army; (b) much more importantly, his flaws were on the "professional level (unlike the moral or legal level, in the sense that no deviation from Israel's duties according to international law was found)."¹⁴³

With reference to the CM Draft Protocol, a long transition period had been proposed between the Protocol's entry into force—during which use of "older-generation" CMs is allowed under specified conditions, the first condition being *approval by "the highest-ranking operational commander in the area of operations or by the appropriate politically mandated operational authority, in accordance with its national procedure."*¹⁴⁴

138. WINOGRAD REPORT, *supra* note 24, at 497.

139. See HUM. RTS. WATCH, WHY THEY DIED, *supra* note 127, at 238-39 (commenting that IDF soldiers knew that they should not target cluster munitions at civilians because Order No. 33.0133 issued by the IDF Chief of Staff mandated them to conform their actions to the Geneva Conventions).

140. MAG's Legal Opinion, *supra* note 25, ¶ 48.

141. *Id.* ¶ 46.

142. *Id.*

143. *Id.* ¶ 47.

144. GGE-CCW, *Draft Protocol on Cluster Munitions*, *supra* note 17, arts. 4.4(a)-5 (emphasis added) (obligating States Parties to the Protocol to implement the restricted use of CMs with permission from one of these two sources, and to

The Northern Command's O.C., Adam, met the "highest-ranking operational commander" criterion.¹⁴⁵ However, the IDF findings implicate Adam as the officer responsible for the violations; the lower echelons only obeyed his orders.¹⁴⁶ Adam may indeed be to blame. Alternatively, Israel might be sacrificing him in order to evade the threatened U.S. sanctions following the State Department's inquiry into possible violations of its legislation regarding use of American-made CMs.¹⁴⁷ In either case, this incident suggests that the CM Draft Protocol's important condition for avoiding a humanitarian crisis during the lengthy transition period is far from foolproof. Indeed, although it is less likely that a senior officer (as opposed to a junior officer) will err in this regard, the 2006 War demonstrated how weak this assumption may be in the field.

Second, much more alarming and, as such, a strong argument in favor of the CCM, is MAG's argument that despite the magnitude of CM use against the relatively populated area of South Lebanon, the deployment was still in full compliance with IHL. In a nutshell, Israel's extensive use of CMs—which, as the MAG stressed, is "a legal weapon which does not inflict superfluous injury on the enemy

also take steps not to develop new CMs that would be prohibited under the protocol, to technologically improve the accuracy and failure rate of the new CMs produced, and to pare down stores of CMs to only the amount necessary for military operations).

145. See Yaakov Katz, *Security and Defense: Udi Adam's War*, JERUSALEM POST, July 20, 2006, available at <http://www.jpost.com/servlet/Satellite?cid=1153291961904&pagename=JPArticle%2FShowFull> (reporting that the IDF employed a new command structure during the second Lebanon war in which Major-General Udi Adam, the Northern Command's O.C., was in charge of all IDF ground, navy, and air forces in the Lebanon operation zone, rather than just ground forces).

146. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 97-98 (observing that soldiers attributed command responsibility for the firing of CMs to the land forces command, headed by Major-General Adam, who, as they alleged, ordered all use of CMs).

147. See *supra* note 94 and accompanying text (discussing the investigation of Israeli misuse of U.S.-made bombs); see also JEREMY M. SHARP, CONG. RESEARCH SERV. REP. FOR CONGRESS, U.S. FOREIGN AID TO ISRAEL 7-8 (2008), available at <http://www.fas.org/sgp/crs/mideast/RL33222.pdf> (reporting on the potential end of aid to Israel under the Arms Export Control Act, following the U.S. Department of State's preliminary conclusion that Israel may have violated a classified bilateral procurement agreement restricting the use of cluster bombs in civilian-populated areas).

(i.e., within the principle of humanity)”¹⁴⁸—was legal as there was (1) a concrete *military necessity* to prevent rockets being fired at Israel; and (2) the principles of *distinction* and *proportionality* were maintained because the CMs were fired exclusively at military targets and only after it was determined that the potential collateral damage was not disproportionate to the military advantage gained.¹⁴⁹ In practice, the MAG held the view that excluding the clear deviation already mentioned and an additional case in which CMs were used to assist in evacuating forces,¹⁵⁰ CMs were used in populated areas solely as an immediate defensive response to rocket attacks after non-combatants were evacuated from these same targets.¹⁵¹ That is, all the uses, save one, were lawful.

A critical review of the MAG’s analysis deserves a separate article and, more importantly, has little to do with this article’s purpose. Analyses of CM legality *per se*¹⁵² and of the legality of CM use in

148. MAG’s Legal Opinion, *supra* note 25, ¶ 38 ; *see also* Herthel, *supra* note 30, at 257-59 (presenting the debate among legal scholars as to whether the criticisms that CMs cause superfluous injury or unnecessary suffering should warrant banning them as inhumane when they also serve significantly useful military functions); Karen Hulme, *Of Questionable Legality: The Military Use of Cluster Bombs in Iraq in 2003*, in THE CANADIAN BRANCH, INT’L LAW ASS’N & THE CANADIAN COUNCIL ON INT’L LAW, THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 143, 165-69 (2004) (postulating on the characterization of CMs as causing “unnecessary suffering” based on the amount of bodily damage that they can cause when smaller fragments come in contact with the human body); Thomas M. McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 66-74 (2002) (assessing whether the use of CMs satisfies the balancing test that governs the prohibition of weapons causing superfluous injury in light of criteria proposed by the International Committee of the Red Cross on the foreseeability of the injuries that may be caused by the CM’s design). *See generally* Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering*, 299 INT’L REV. RED CROSS 98, 98-122 (1994) (detailing the history of the principle of superfluous injury or unnecessary suffering and its application through the Hague Regulations and First Additional Protocol to the Geneva Conventions of 1977).

149. *See* MAG’s Legal Opinion, *supra* note 25, ¶¶ 32-39. For a summary of this argument *see* WINOGRAD REPORT, *supra* note 24, at 498, ¶ 10.

150. MAG’s Legal Opinion, *supra* note 25. In this case, the firing was at the Lebanese village of Maroon-A-Ras on July 20, and Halutz himself justified the use *post facto*. *Id.*

151. *See* MAG’s Legal Opinion, *supra* note 25, ¶¶ 18-20.

152. *See, e.g.,* Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT’L L. 85, 104-19 (2000-2001) (assessing whether cluster bomb use constitutes

specific cases (e.g., Kosovo, Iraq)¹⁵³ are readily available; they can be applied, *mutatis mutandis*, in this case as well. Furthermore, the current case has already attracted several attempts of legal analyses by NGOs.¹⁵⁴ and would likely have been discussed by Israel's High Court of Justice had not ACRI backed down from its intention to submit a petition regarding the absence of any legal action taken against those responsible for the extensive CM use.¹⁵⁵

indiscriminate use because of the natural geographic imprecision associated with their use and the ability for unexploded cluster bombs to become landmines when they fail to detonate on impact); Herthel, *supra* note 30, at 249, 265-68 (concluding that cluster bombs are not naturally indiscriminate because customary international law has not deemed them to be, and that the large area which cluster bombs can affect does not automatically deem them to be indiscriminate); Breitegger, *supra* note 28, at 9-13 (considering that military necessity weighed against humanitarian concerns might require the use of cluster munitions, providing a reason why cluster munitions could not be *per se* illegal); Van Woudenburg, *supra* note 3, at 454-64 (noting the statements of commentators that no treaty or rule of customary international law specifically makes cluster munitions illegal, nor do they indirectly make them illegal by prohibiting their use, so long as they cause no civilian casualties).

153. See generally McDonnell, *supra* note 148 (using the NATO intervention in Kosovo as an example of the use of cluster bombs in order to assess whether international law prohibits their use altogether); cf. Hulme, *supra* note 148 (analyzing whether U.S. use of cluster munitions during Operation Iraqi Freedom was inherently indiscriminate given the high failure rate of the CMs and other known factors such as the effect of geographical and weather conditions on the scattering of submunitions over large areas).

154. See, e.g., HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 104-11 (concluding that Israel could foresee that its use of cluster munitions would violate international humanitarian law because of the disproportionality of attacks against civilian areas in the last days of the war as well as the less-than-thorough means of communicating with Lebanese civilians to evacuate areas that the IDF planned to bomb).

155. Telephone interview with Adv. Dan Yakir, Chief Legal Counsel at ACRI, Oct. 29, 2008. Email correspondence, Dec. 22, 2008; May 29, 2010; May 30, 2010. In fact, as long as there was an IDF "on-going investigation," over CM use, no domestic legal action was available to those Israeli NGOs and civil right advocates, which believed that their use constitutes an IHL violation; once the investigation ended and the ACRI's January 2008 request to the MAG to release his legal opinion still went unanswered, the ACRI turned to AG Mazuz in March 2008, urging him to open a criminal inquiry into Israel's extensive use of the weapon. See *Re: Opening a Criminal Inquiry over the Use of Cluster Bombs in the Second Lebanon War*, Mar. 2, 2008, <http://www.acri.org.il/Story.aspx?id=1785>. Three months later, on June 18, 2008, the MAG released a short version of his legal opinion. After reviewing the opinion, the ACRI decided not to withdraw its appeal to Mazuz, who has refrained from even acknowledging the ACRI's letter.

Nevertheless, what is important for our purposes is the unavoidable conclusion that states can fire millions of bomblets at populated areas and remain confident that their actions fully comply with IHL. Thus IHL, in itself, can do little to prevent future massive CM use, not because states adamantly choose to commit gross violations of IHL, but because they are confident that IHL is on their side. As such, it seems that only a total ban can secure the world against similar cases in the future.¹⁵⁶

LESSON 5: NONE TO BE TRUSTED: ISRAEL'S UNCONTROLLED CM USE

No doubt, unlike technical issues (e.g., HDRs of various CM types), the Winograd Commission was more mindful of Israel's formal stance when examining the core issue: *Israel's extensive CM use*. On this issue, the Committee preferred to rely on Ha'cohen's findings as to the impossibility of verifying the duds' numbers and locations, dates of CMs employment, designated targets, and circumstances of firing.¹⁵⁷

This article respectfully but categorically disagrees with the Winograd Commission's findings regarding this issue: the duds' numbers and locations are readily available through MACC SL's monthly reports.¹⁵⁸ In addition, the last three factors are quite

156. Indeed, alternative weapons designed to cover widespread areas (area weapons), such as flechettes or Fuel-Air Explosive ("FAE") bombs, may be equally devastating at the time of use but pose no serious post-conflict damage because no dud problems arise. See Fuel/Air Explosive (FAE), <http://www.fas.org/man/dod-101/sys/dumb/fae.htm> (last visited May 14, 2010) (explaining the operation of the FAE and capacity to cause damage through release of a vapor cloud rather than expelling an explosive). For a comprehensive overview of the humanitarian concerns regarding flechettes, see EITAN BARAK, DEADLY METAL RAIN: THE LEGALITY OF FLECHETTE WEAPONS IN INTERNATIONAL LAW – A REAPPRAISAL FOLLOWING ISRAEL'S USE IN THE GAZA STRIP (2001-2009) (Christopher Greenwood & Timothy L.H. McCormack eds., Martinus Nijhoff Publishers, forthcoming 2010) (on file with the author).

157. See generally WINOGRAD REPORT, *supra* note 24.

158. See, e.g. Mine Action Coordination Ctr. S. Lebanon, Quarterly Report of the Mine Action Coordination Centre, South Lebanon for the Period April to June 2007 (2007), available at <http://www.mineaction.org/downloads/1/MACC%20Quarterly%20April%20-%20June%202007.pdf> (charting the number of civilian mine incidents during the quarter, as well as the number of mines cleared in the time period).

accessible for most used CMs, and can be tracked by (digital) operational logbooks of any artillery unit, not to mention an IAF squadron logbook.¹⁵⁹ Furthermore, all of the respective information has been collected by the IDF's Investigating Officer, Ha'cohen, who testified before the Commission.¹⁶⁰ The Commission indeed explained at length its decision to refrain from inquiring into whether Israel had complied with the Law of War during the Second Lebanon War, as well as to disregard specific cases and NGO allegations of IHL violations, both based on its inability to construct the appropriate evidentiary infrastructure. The fact that some allegations of IHL violations have already been reviewed or will be reviewed by the appropriate bodies, together with the issue of due process of expected IDF personnel likely to be found liable for those IHL violations were raised as well.

Nevertheless, regarding *Israel's extensive CM use*, the Commission's explicit concern over its findings' abuse by anti-Israel forces, in addition to its wariness regarding potential diplomatic entanglements, seems to have played a significant role in its decision to sidestep a truly independent, in-depth inquiry. Such an inquiry would, after all, have either verified or refuted Israel's formal explanation, according to which firing CMs at populated areas entailed a clear breach of IDF orders; that explanation assisted the pro-Israeli Bush Administration to end the diplomatic strain resulting from use of U.S.-made CMs.¹⁶¹ Because the Winograd Commission refrained from scrutinizing the MAG's findings,¹⁶² it falls upon us to do so with all the other sources available. These sources imply that the MAG's findings regarding the well-organized and supervised CM use may be incomplete. Moreover, Israel's extensive use of munitions in general and CMs in particular is a worrying sign for a world in which armed conflicts are frequent in environments having no bans or even use restrictions on CMs, as discussed below.

159. The IDF has no data regarding 25% of the total 173,293 projectiles and rockets fired. However, due to the IDF's sensitivity over CM weapons, most of its data refer to other type of munitions, mainly smoke and explosive shells. See Zigdon, *supra* note 132, at 51 & n.23.

160. WINOGRAD REPORT, *supra* note 24.

161. *Id.* at 484-85.

162. *Id.*

In light of the Second Lebanon War's limited geographical area and short duration (34 days), there is no doubt that an unprecedented quantity of munitions, especially CMs, were fired even considering Israel's many wars. In the 1967 Six-Day War, 78,812 shells were fired against three regular armies (the Egyptian, Syrian, and Jordanian, with the assistance of Iraqi forces); in the 1973 War, 145,000 shells were used against two regular armies (Egyptian and Syrian, with the assistance of the Iraqi, Jordanian, and to a lesser extent, Saudi forces); in the 1982 first Lebanon War, 81,230 shells were used; but in the 2006 Second Lebanon War, 173,293 shells and MLRS rockets were used.¹⁶³ In contrast, Israel took control over the same area using only 17,000 shells (i.e., in the March 1978 the *Litani Operation*).¹⁶⁴ The use of aerial munitions was even more unprecedented given the large number of sorties the IAF conducted; an average of 350 sorties per day, more than in the 1973 War.¹⁶⁵ Their daily average was reduced only when the IAF reached the red line of selected munition stocks.¹⁶⁶

No doubt, as the Winograd Commission stressed: "*the quantity of munitions used in the Second Lebanon War was very high compared to former wars.*"¹⁶⁷ The real problem associated with these figures, however, is that this massive use of artillery was neither planned nor properly supervised. As the former Commander of the IDF's Military College, Brigadier General (Reserve) Yaacov Zigdon discovered that "[t]he intensified munitions consumption and the reaching of red lines point to a lack of control, ignorance and lack of supervision over the army."¹⁶⁸ Israeli military commentators were much bolder in their criticism: "While the Israeli society was certain that the IDF

163. Zigdon, *supra* note 132, at 44-45. For additional data on the 1973 War, see ALHANAN OREN, *THE YOM KIPPUR WAR: A HISTORY* 322 (2004) (in Hebrew).

164. OFER SHELAH & YOAV LIMOR, *CAPTIVES OF LEBANON* 159 (2007) (in Hebrew).

165. AMOS HAREL & AVI ISSACHAROFF, *SPIDER WEBS (34 DAYS)* 292 (2008) (in Hebrew).

166. *Id.* These data are missing from the English translation (see AMOS HAREL & AVI ISSACHAROFF, *34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON* (Ora Cummings & Moshe Tlamim trans., 2008). On the massive air power employed see Genenera (Reserve) Itzhak Ben Israel, *The First Missile War: Israel-Hizbollah*, Position Paper, Tel-Aviv Univ., at 41 (2007) (in Hebrew).

167. WINOGRAD REPORT, *supra* note 24, at 345, ¶ 37 (emphasis in original).

168. Zigdon, *supra* note 132, at 52.

artillery fire was constrained by higher powers, in actuality the army [IDF], fired everything it had . . . with no control . . . without a higher command to regulate, monitor, and supervise the ineffective flood of artillery fire.”¹⁶⁹

Earlier press reports and personal accounts of uncontrolled artillery fire was recently confirmed by the Knesset’s Foreign Affairs and Security Committee (“FASC”), which reviewed various aspects of the war with all the material at hand. The FASC concluded in its December 2007 report—which, as an official report, was subject to a severe censorship and excludes any mention of CMs—that “basing the military campaign on the fire component brought about the extensive use of different types of munitions from the War’s breakout. Attempts to restrain consumption by the General Staff’s Munitions Committee were of no avail.”¹⁷⁰ In fact, it was found that only on July 28, a fortnight after the war’s beginning, was the Chief of Staff presented with the arsenal status for the first time.¹⁷¹ Given the high munitions consumption rate reached, weekly weapons quotas for the various IDF units were decided.¹⁷² Nonetheless, the FASC found that neither the Munitions Committee nor the General Staff were able to enforce this decision on the operational level.¹⁷³ A similar conclusion was reached by another official committee: the Defense Budget Review Committee which, in its May 2007 report, found that there was “highly excessive” use of munitions and that “no one in the army or the government had been designated with the task of reviewing this question and ordering any changes.”¹⁷⁴

And so, unlike the favorable image sketched in the MAG’s legal opinion, Israel’s use of munitions in general and CMs in particular

169. SHELAH & LIMOR, *supra* note 164, at 159.

170. See KNESSET FOR. AFF. & SECURITY COMM. [KFASC], LESSONS OF THE SECOND LEBANON WAR 113 (2007), http://portal.knesset.gov.il/NR/rdonlyres/215EB752-A463-4E11-88DA-E1F087A72E44/151/bitachon17_2.pdf (in Hebrew).

171. KFASC, *supra* note 170, at 113.

172. *Id.*

173. *Id.*

174. THE STATE OF ISRAEL, THE DEFENSE BUDGET REVIEW COMMITTEE 90-91 (2007), *available at* <http://www.pmo.gov.il/NR/rdonlyres/F1FF400E-2A04-4042-90C0-FCEDD874AF88/0/Brodet.pdf> (in Hebrew). The Committee is known as the Brodet Committee after its head, David Brodet, former CEO of Israel’s Ministry of Treasury. P.M. Olmert assigned the committee in November 2006 to examine the defense budget in the wake of the Lebanon War.

was *unconstrained*. As Hagai Alon, a former political adviser of wartime Minister of Defense Amir Peretz recently confessed:

Only after the war did we, Amir and I, first learn about the use of cluster bombs . . . the responsible echelons in the IDF refused to provide me the maps [of the strike locations].¹⁷⁵ They wanted to hide the fact that we have fired this problematic weapon into populated zones like crazy. This was done without any higher authorization and in an uncontrolled manner . . .¹⁷⁶

While the question remains open as to how much it was affected from the fact that, as scholars have already noted, revenge played a considerable role in Israel's conduct during the War,¹⁷⁷ few states, if any, can criticize Israel for its actions. Neither American nor British cities, for instance, were under rocket barrage when their armies employed CMs abroad (i.e., in Vietnam, Iraq, and Kosovo).¹⁷⁸ One

175. MAG's Legal Opinion, *supra* note 25, ¶ 40 (noting that Israel provided such maps at the war's end); see *IDF spokesman: No Sweeping Prohibition*, HAARETZ, Sep. 8, 2006, at 4 (in Hebrew); see also Interview with Mrs. Rodica Radian Gordon, Director, Arms Control Department, Isr. Ministry of Foreign Aff. (Oct. 7, 2008) (confirming that Israel provided such maps in February 2008 in addition to at the war's end). But see The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), ¶ 39, delivered to the Security Council, U.N. Doc. S/2006/730 (quoting, "[w]hile the IDF has provided some maps . . . they are not specific enough to be of use to operators on the ground. I expect that Israel will provide further detailed information to UNIFIL regarding the exact location, quantity and type of cluster munitions utilized during the conflict"); Ina Friedman, *Deadly Remnants*, JERUSALEM REP., Nov. 13, 2006, at 20, 22 (reporting that Israel, in contrast, has so far refused to provide detailed maps with corresponding quantities, arguing that UNSC Res.1701 "did not require Israel to provide the GPS coordinates, as it speaks only of conveying to the United Nations all remaining maps of land mines in Lebanon in Israel's possession," and explaining IDF Code of Conduct author and Professor Asa Kasher's justification that the refusal stood Israel's interest in preventing exposure of its intelligence regarding the exact location of various Hezbollah posts).

176. Akiva Eldar, interview with Hagai Alon, Amir Peretz's political adviser, *Captured in Conception*, HAARETZ FRIDAY MAGAZINE, 21, 24 (July 18, 2008) (in Hebrew).

177. See Oded Löwenheim & Gadi Heimann, *Revenge in International Politics*, 17 SEC. STUD. 685, 723 (2008) (arguing that this is because some states may view a violation of their rights as more offensive than other states would in a similar situation).

178. Hum. Rts. Watch, *Survey of Cluster Munition Policy and Practice* 61 (Feb.

can only imagine the level of munitions, including CMs, which these states might use should they find themselves in a similar situation.¹⁷⁹ The strategic bombing in WWII is a worrying sign of this tendency. As long as CMs are integral parts of military arsenals,¹⁸⁰ it seems quite plausible that states possessing CM weapons, when facing a situation similar to that of Israel in 2006, *would massively employ CMs*.

LESSON 6: ON THE CM'S ALLEGED MILITARY EFFECTIVENESS

As mentioned, CMs enjoy a reputation for high military effectiveness. As Ambassador Mull has stated: "The United States relies on them as an important part of our own defense strategy. Many of our allies rely on them as well."¹⁸¹ Therefore, it is interesting to assess whether this image remains warranted after the 2006 Lebanon case as well, particularly given the prominent role that CMs played when compared to other conflicts in which they were employed. In fact, while reviewing former cases of CM use, a 2007 study was forced to qualify its conclusion regarding the CM's "Declining Military Utility" due to the lack of data from the 2006 Lebanon case.¹⁸² As such, this lesson has unique import given the current debate between CCM supporters who question whether CMs had not become a "Cold War relic"¹⁸³ and those who maintain the stance taken by Ambassador Mull.

2007.

179. This question would effectively be relevant only for the United States; the United Kingdom has signed the CCM whereas the United States has not. *See* Convention on Cluster Munitions, Ratifications and Signatures, *supra* note 1.

180. *See id.* at 1-2 (acknowledging that the CM weapons category is the most in need of stronger laws that protect citizens because of their growing use).

181. Mull, *supra* note 109 (recognizing the effectiveness of CMs but also their devastating impact on civil society).

182. Bonnie Docherty, *The Time is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 66-69 (2007) ("The Israeli military has not made a statement on why it used cluster munitions in this circumstance or whether it judged them to be effective.").

183. *Id.* at 66-67 (noting that this question was also raised by U.S. forces (Third Infantry Division) which employed CMs in the 2003 war in Iraq, where the soldiers complained that the weapons endangered their own forces as well as civilians).

As noted previously, artillery CMs were employed to achieve three objectives, the first two of which provided Israel with its official justification for their massive use:¹⁸⁴ (a) preventing rocket fire on Israel by targeting the rocket launchers (which consumed ten percent of total shells and rockets); (b) in the event that the rocket launchers could not be destroyed, limiting the amount of rockets fired by disrupting activities in the area (which consumed twenty percent of total shells and rockets; in addition to artillery CMs, aerially dropped CMs were used as well); and (c) providing artillery support for ground forces (which consumed forty percent of total shells and rockets).¹⁸⁵

With respect to the first objective, despite the six thousand cases in which the IDF pinpointed the launching site and instantly shelled it during the Second Lebanon War, mainly with CM rockets, there was *not even one single case of a recorded success*. In fact, Hezbollah's ability to fire an impressive 250 rockets on the very last day of the War testified to this failure.¹⁸⁶

As for the second objective, the rationale was that constant firing of CMs would prevent Hezbollah's militiamen from approaching their launchers. Based on intelligence data and general estimates, Israeli fire was executed in fifty "nature reserves" and two hundred villages which turned out to be launching sites—indeed, as the war lengthened, the amount of munitions needed became unprecedented. Nonetheless, legitimate¹⁸⁷ and tactically reasonable as this objective was, it achieved little more than a local effect, with only a twenty percent reduction in launches. As the Knesset's FASC concluded:

184. See UNHRC REPORT, *supra* note 77, ¶ 55 (finding that the use of CMs was inconsistent with principles of distinction and proportionality).

185. See Zigdon, *supra* note 132, at 48-49 (declaring that no reliable record of the nature of the remaining 30% of shells used exists).

186. *Id.* As Harel & Issacharoff wrote: "Even today, artillerymen are not able to point out a single launcher which was definitely destroyed in artillery fire." See Zigdon, *supra* note 132, at 287.

187. See TIMOTHY H. MCCORMACK & PARAMDEEP B. MTHARU, EXPECTED CIVILIAN DAMAGE & THE PROPORTIONALITY EQUATION: INTERNATIONAL HUMANITARIAN LAW & EXPLOSIVE REMNANTS OF WAR 9 (2006), available at http://www.apcml.org/documents/un_report_exp_civilian_damage_1106.pdf (noting that choosing CMs that leave many duds in order to prevent enemy access to defined areas was in fact recognized as a mid- to long-term military advantage; but, of course, this only applied to the nature reserves).

"[I]n spite of the extensive firing, from an analysis of our forces' firing data . . . it clear that the disruption mission had only a minor and short-term affect. In general, it could not, in itself, influence the extent of rockets fired by Hezbollah."¹⁸⁸

As to the third objective of Israel's employing artillery CMs (i.e., minimizing IDF casualties as much as possible by relying on large amounts of munitions), the lack of adequate high command supervision was obvious. For instance, "the town Alkhiam [15,000 inhabitants, mainly Shia Muslims] was heavily bombarded, in the absence of precise and clear intelligence, for no effective purpose and or reason."¹⁸⁹ According to the Knesset's FASC, "there was also an excess use of munitions [used to support ground forces] given the needs and the fire's limited efficiency."¹⁹⁰

In sum, the near-consensus among Israeli writers quite soon after the war that the use of CMs in 2006 was to no avail has been confirmed by official Israeli sources. None of the three IDF military objectives approved for CMs employment justified their use given the humanitarian costs such weapons can incur. Hence, as this lesson suggests, CM military effectiveness should be reconsidered when facing today's new and changing battlefield. Designated for traditional battlefields such as those faced in the 1973 War, during which regular armies and heavy armored forces fought one another, CMs perform poorly against small guerilla squads, which sometimes employ nothing but a lone launcher and are capable of evading IDF spotting systems.

This lesson accords with recent research pointing to the "*declining military utility*" of CMs.¹⁹¹ While these studies base their conclusions

188. KFASC, *supra* note 170, at 113.

189. Zigdon, *supra* note 132, at 50 (recognizing that the magnitude of munitions for this purpose reached such a level that it was argued that in some cases relying on the heavy fire even replaced required maneuvers).

190. KFASC, *supra* note 170, at 51, 113 (explaining that it was clear in many cases that there was no proper purpose behind the fire). As Brigadier-General Lorange Mualem, Chief of Artillery Corps stated, "in the absence of maneuvers, what is left to do, is fire!" *Id.*

191. See, e.g., Docherty, *supra* note 182, at 59-61 (asserting that various generals and the Congressional Research Service disfavor the use of these weapons because of decreasing utility); see also REINHILDE WEIDACHER ET AL., CLUSTER WEAPONS: NECESSITY OR CONVENIENCE? 20-25 (2005) (declaring that cluster weapons are often being replaced with other more precise weapons with unitary

on recent conflicts, it is interesting to note that CMs became entrenched in Western military thinking following the Vietnam War.¹⁹² However, if one were to review the effectiveness of CMs in that war, one would also reach the conclusion that the United States apparently achieved no sustainable battlefield advantages from using more than 350 million bomblets of various types.¹⁹³ Official U.S. assessments regarding use of CMs in the 1991 Operation Desert Storm¹⁹⁴ and in the 1999 Kosovo Campaign, for instance—before the U.S. Command hurriedly replaced an unfavorable report on their use with a positive one¹⁹⁵—indicate that any assessment of the weapon's effectiveness may be somehow overestimated should Israel, for example, become involved in a more “traditional” war against Syria.¹⁹⁶

warheads).

192. See, e.g., Docherty, *supra* note 182, at 64 (noting that the country of Laos still suffers effects of these weapons).

193. Cf. PROKOSCH, *supra* note 32, at 112 (examining the difficulties of assessing the weapons' "actual impact" during that War).

194. See RAE MCGRATH, CLUSTER BOMBS: THE MILITARY EFFECTIVENESS AND IMPACT ON CIVILIANS OF CLUSTER MUNITIONS 7 (Richard Lloyd ed., 2000) (recording that U.S. forces used 47,167 units containing 13,167,544 bomblets in Operation Desert Storm).

195. See *id.* (explaining the data given in the Defense Department Report). See generally DEPT. OF DEF., KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT (2000) (assessing the comprehensive investigation that U.S. forces conducted in Kosovo).

196. E.g., WEIDACHER ET AL., *supra* note 191, at 25 (basing its findings on a survey about CMs and military utility among forty-five countries from which forty-three had stockpiled these weapons, and positing that "Israel is one of very few Western countries still facing a possibility of massive armored attacks, a situation where cluster weapons have a major role"); see also Reuven Pedatzur, *If War Breaks Out*, HAARETZ, Aug. 12, 2008, <http://www.haaretz.com/hasen/spages/915893.html> (reporting that current military analyses on the Syrian army have pointed that "the Syrian army has gradually become less armored and less mechanized; it is more and more based on infantry, commando units and antitank weapons."). But see Yaakov Katz, *Massive IDF Drill Prepares for Syrian Attack. Hundreds of Tanks Thousands of Troops in Golan War Simulation*, JERUSALEM POST, Apr. 27, 2007, at 1 (asserting that due to an IDF post-Lebanon War large scale drill, "the IDF has not ruled out the possibility that a war would also entail tank battles, once believed to have been a relic of historic wars like the Six Day War in 1967 and the Yom Kippur War in 1973"); *Middle East Military Balance: Syria*, INST. NAT'L SECURITY STUD. DATABASE, May 16, 2007, at 6, available at [http://www.inss.org.il/upload/\(FILE\)1188214444.pdf](http://www.inss.org.il/upload/(FILE)1188214444.pdf) (implying that MLRS equipped with CMs rockets may prove to be effective in targeting mass artillery batteries Syria has deployed along its 1974 disengagement line with Israel border

LESSON 7: THE SIGNIFICANT CONTRIBUTION OF THE WINOGRAD COMMISSION TO THE CASE FOR THE CCM

The conclusion from the MAG's legal opinion, according to which Israel's extensive use of CMs fully accorded with IHL, is that millions of bomblets can be fired at populated areas and their vicinity, as happened in the 2006 War.¹⁹⁷ This seemed preposterous even for the Winograd Commission, but it refrained from any inquiry which would undermine the IDF version. Instead, it chose to focus on the following "legal-factual question":

What is the legality of Cluster Munitions firing at military target within civilian concentration, such as village, . . . when it is known that the village's residents are temporarily absent due to the warfare, but it is known that they would return to their villages in its aftermath?¹⁹⁸

According to the MAG's view,—which the committee mistakenly named "an extended interpretation" because the legal review was conducted during the warfare itself¹⁹⁹—if the use of CMs at that time is in accordance with IHL, *then the anticipated long-term impact of the duds should not affect the results*. Consequently, even if the MAG was cognizant of the actual post-conflict effects on South Lebanon, he argued that such a use could accord with IHL.²⁰⁰

However, the Winograd Commission rejected this view, stating that such an "extended interpretation . . . is inconsistent with the underlying rationale of the restrictions on the use of CMs."²⁰¹ Therefore, it concluded that allowing CM use in populated areas

due to the massive Syrian defense force).

197. See MAG's Legal Opinion, *supra* note 25; see also *Israel: Cluster Bomb Use Was Legal*, CNN.COM, Dec. 25, 2007, available at <http://www.cnn.com/2007/WORLD/meast/12/25/israel.cluster.bombs/index.html> (reporting that the Israeli military advocate general would not prosecute anyone who authorized use of the cluster bombs during the 2006 war).

198. WINOGRAD REPORT, *supra* note 24, at 498 (emphasis in original).

199. *Id.*; cf. Israeli Ministry of For. Aff., The Operation in Gaza: Factual and Legal Aspects, ¶ 251, available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_factual_and_legal_aspects_use_of_force_IDF_conduct_5_Aug_2009.htm (reporting that Israeli targeting decisions during the Gaza Operation were planned in advance with military and legal officers).

200. See WINOGRAD REPORT, *supra* note 24, ¶ 12.

201. *Id.* at 498.

“even after their residents have been temporarily evacuated” is unacceptable “without stringent and individual review.”²⁰² The Commission then asked the IDF to ensure that its view would be promptly and clearly internalized by the IDF.²⁰³

No doubt, this is an important contribution to a long standing and disputed issue having far-reaching implications for CMs’ legality. The main argument used to undermine that legality was that CMs are inherently indiscriminate weapons. Under the principle of discrimination, which, together with the “Principle of Humanity,” is a “cardinal principle” governing the use of conventional weapons,²⁰⁴ states should never “use weapons that are incapable of distinguishing between civilian and military targets.”²⁰⁵

202. *Id.* But see Press Release, Amnesty Int’l, Israel: Winograd Commission Disregards Israeli War Crimes (Jan. 31, 2008), available at <http://www.amnesty.org/en/for-media/press-releases/israel-winograd-commission-disregards-israeli-war-crimes-20080131> (arguing that the Winograd Commission only gave token consideration to the indiscriminate killings in its report and did not provide adequate data on the cluster bombs used during the war).

203. See WINOGRAD REPORT, *supra* note 24, at 498. (acknowledging, however, that its own interpretation would impose further restrictions on the IDF against those who use “built-up areas” as a basis of their operations—a method of warfare explicitly prohibited by the IHL).

204. See Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (“States do not have unlimited freedom of choice of means in the weapons they use.”); see Convention Respecting the Laws and Customs of War on Land art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (“In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . (b) To kill or wound treacherously individuals belonging to the hostile nation or army”; The Secretariat, *Respect for Human Rights in Armed Conflicts: Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons*, at ¶ 7, delivered to the United Nations General Assembly, U.N. Doc. A/9215 (Nov. 7, 1973) (explaining that the Martens Clause in the Hague Convention is an additional ground for prohibition of treacherous or perfidious weapons, referring to the effects of weapons such as mines, booby traps, and delayed-action bombs on noncombatants); R.R. Baxter, *Conventional Weapons Under Legal Prohibitions*, 1 INT’L SEC. 42, 47 (1977) (noting that the existing law governing the use of prohibited weapons is “archaic and excessively general” in character). But see KALSHOVEN, *supra* note 31, at 237 (explaining that, in regard to the 1974 Lucerne Conference of Governmental Experts on the Use of Certain Conventional Weapons (“Lucerne Conference”), “[t]he prevalent feeling was that the concept did not merit a separate place among the legal criteria governing use of conventional weapons”).

205. Advisory Opinion, 1996 I.C.J. 226, at 257 (stressing that humanitarian law was created to eliminate unnecessary harm greater than that unavoidable to achieve legitimate military objectives); see also DINSTEIN, *supra* note 129, at 57 (in

Traditionally, it has been argued that CMs are inherently indiscriminate as their wide dispersal pattern (known in military parlance as 'footprint') means that they cannot be targeted against military objectives exclusively.²⁰⁶ Employing thus might CMs violate Article 51(4)(b) of AP I, which reflects customary IHL regarding weapons that cannot be directed at specific military targets.²⁰⁷ However, when the problem associated with ERW came to the fore, the emphasis shifted to the CMs' inherently high failure rate rather than their inaccuracy.²⁰⁸ Under the new emphasis, it was argued that since CMs cause casualties after a conflict's end, then those casualties are, in effect, only civilian. Indeed, the ICRC Commentary of AP I seems to suggest that unrecorded minefields having mines without reliable self-destruct mechanisms violate Article 51(4)(b).²⁰⁹

addition to these two "cardinal principles," it was argued that "the Court identified a third fundamental principle: the principle of neutrality, whereby, *inter alia*, the effects of weapons must be contained within the territories of the belligerent States."). *But see* CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 252 (2007) (pointing out that it is hard to conceive that "[t]his principle has only very limited significance for the use of weapons other than nuclear weapons . . ." [and we should add biological ones as well]).

206. *See* Docherty, *supra* note 182, at 57-61 (documenting that some weapons are so difficult to target that they endanger military forces as well as civilian populations).

207. *See, e.g.,* Hulme, *supra* note 148, at 173-74 (arguing that inaccurate weapons that have little or no guidance systems cannot discriminate effectively between military and civilian objects); *see also* PILLOUD ET AL., *supra* note 129, ¶¶ 1956-60; MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, 305 (1987) (commenting that the reference in AP I 51(4)(b) prohibits " 'blind' weapons which cannot, with any reasonable assurance be directed against a military objective.")

208. *See, e.g.,* Hulme, *supra* note 148, 175-89 (pointing out that natural conditions such as wind and marshes are likely to worsen the failure rate of cluster bombs); McDonnell, *supra* note 148, at 79-87 (concluding that, in Serbia and Kosovo, the risking of civilian lives was "excessive compared to the non-existent military advantage."); *see also* Breitegger, *supra* note 28, at 10 (positing that this shift may have been affected by the International Court of Justice's ("ICJ") acceptance of the nuclear weapons states' reasoning in the *Nuclear Weapons Case*, according to which a weapon is inherently indiscriminate only if its use would result in military and civilian casualties in all circumstances: "in line with such reasoning, it would seem to be virtually impossible to conclude that any weapon is prohibited per se.").

209. *See* Breitegger, *supra* note 28, at 13 (noting that untrained civilians would be in danger if they handled hidden cluster bombs that remained and that such

As one scholar rightly noted: “The dud cluster bomb is virtually identical to an unmarked and unmapped mine without [a] modern self-destruct mechanism[.]”²¹⁰

Nevertheless, even in the absence of customary prohibitions on CMs, non-CCM member or signatory states employing this weapon are still obligated by the customary rule of proportionality to take all necessary steps to prevent CMs from indiscriminately causing civilian casualties.²¹¹ As such, a crucial practical issue is CMs’ post-conflict effects on the proportionality probe, which balances military advantage with civilian impact.²¹²

According to Article 51(5)(b) of AP I which reflects customary IHL, an attack is disproportionate and thus indiscriminate if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²¹³ While it is understandable that incidental

types of bombings represent the antithesis of trying to require distinguishing military and civilian objectives).

210. McDonnell, *supra* note 148, at 80; see PILLOUD ET AL., *supra* note 129, ¶ 1959 (requiring that mines laid by aircraft or remote-delivery have recorded locations or self-destruct mechanisms); accord BOTHE ET AL., *supra* note 207, at 308 (explaining that modern remotely delivered mines have self-destruct mechanisms so they are not indiscriminate as to time but that obsolete mines that cause casualties may still exist that are indiscriminate as to time).

211. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims in an International Armed Conflict (Protocol I) Art. 48, 51(4)-(8), 8 June 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (requiring use of force that is not indiscriminate and that is limited to legitimate military objectives).

212. See Breitegger, *supra* note 28, at 38 (concluding that there is a need for states to address long-term civilian losses instead of just short-term losses due to the impact of cluster munitions).

213. Protocol I, *supra* note 216, art. 51(5)(b). The proportionality standard is also reiterated in reiterated in Article 57(2)(a)(iii). See *id.* art. 57(2)(a)(iii); see also PILLOUD ET AL., *supra* note 129, ¶¶ 1967-81 (discussing the types of attacks that this article contemplated: (1) area bombardment, and (2) those with “excessive effects in relation to the concrete and direct military advantage anticipated”); JUDITH GARDEM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES 59-84 (2004) (advocating for more legal criteria that bans weapons in the interest of international humanitarian law); see also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 306-13 (2005) (describing specific examples of states that have incorporated customary international humanitarian law into their domestic law and military manuals).

civilian losses must be reasonably foreseeable, the debate remains unresolved as to whether only immediate and short-term civilian losses can be reasonably foreseeable without being able to predict long-term civilian harm.²¹⁴

In light of the unresolved character of the debate, the MAG's view was all but an "extended interpretation."²¹⁵ On the contrary, it reflects a stance that the ICRC defined as outdated in light of the experience gained from the use of CMs and the research conducted into their effects.²¹⁶ As Prof. Christopher Greenwood stated prior to the 2006 War:

If . . . cluster weapons are used against military targets in an area where there are known to be civilians, then the proportionality test may require that account be taken both of the risk to the civilians from sub-munitions exploding during the attack and of the risk from unexploded sub-munitions in the hours immediately after the attack. It is an entirely different matter, however, to require that account be taken of the longer-term risk posed by ERW, particularly of the risk which ERW can pose after a conflict has ended or after civilians have returned to an area from which they had fled. . . . The proportionality test has to be applied on the basis of information reasonably available at the time of the attack. The risks posed by ERW once the immediate aftermath of an attack has passed are too remote to be capable of assessment at that time.²¹⁷

214. See Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 168 (1999) (arguing that the debate reflects a change in emphasis as the proportionality test has always included after-effects; yet, in the past, only direct effects came to the fore of the discussion).

215. WINOGRAD REPORT, *supra* note 24, at 498.

216. See GGE-CCW, Aug. 2-12, 2005, Existing Principles and Rules of International Humanitarian Law Applicable to Munitions that May Become Explosive Remnants of War, at ¶ 20, CCW/GGE/XI/WG.1/WP.7 (July 28, 2005) [hereinafter GGE-CCW Existing Principles] (adopting the view that using the rule of proportionality during planning an attack must include an evaluation of foreseeable incidental consequences and the short- and long-term effects of submunitions that become Explosive Remnants of War).

217. Christopher Greenwood, GGE-CCW, May 21-24, 2002, *Legal Issues Regarding Explosive Remnants of War*, at ¶ 23, CCW/GGE/I/WP.10 (May 23, 2002) (emphasis added) (observing that, "The degree of that risk turns on too many factors which are incapable of assessment at the time of the attack, such as when and whether civilians will be permitted to return to an area, what steps the party

However, given the fact that neither the pertinent AP I articles nor their history establish any time frame, a growing camp (including states,²¹⁸ the ICRC,²¹⁹ legal experts,²²⁰ former military personnel²²¹ and NGOs²²² basing their opinions on research conducted in Iraq, Afghanistan, and Yugoslavia on the CM's long-term impacts on civilians)²²³ takes the opposite view.²²⁴ Finding support in other

controlling that area will have taken to clear unexploded ordnance, what priority that party gives to the protection of civilians and so forth"); *see also* GGE-CCW, Mar. 6-10, 2007, *Report on States Parties' Responses to the Questionnaire on International Humanitarian Law & Explosive Remnants of War*, CCW/GGE/X/WG.1/WP.2. Dated 8 March 2005, at ¶ 27, CCW/GGE/XII/WG.1/WP.12 (Mar. 24, 2006) (reporting that, based on a questionnaire, few states have thought about how the proportionality principle can apply to ERWs).

218. *See* MCCORMACK & MTHARU, *supra* note 187, at 1 (finding that 97% of States consider the rule on proportionality relevant with regards to ERW but that a more controversial issue is "whether a military commander is required to consider . . . longer term harm caused to . . . civilian population[s] . . . as a result of" the proportionality-ERW analysis).

219. *See* GGE-CCW *Existing Principles*, *supra* note 216, ¶ 21 (rejecting the view that the long term effects of ERW's proportionality requirement are "not reasonably foreseeable to a military commander.").

220. *See, e.g.*, GGE-CCW, Aug. 2-12, 2005, *International Humanitarian Law Principles and Explosive Remnants of War*, at 1 n.1, CCW/GGE/XI/WG.1/WP.19 (Aug. 25, 2005) (confirming the view of Professor Tim McCormack, who agrees with imposing requirements for officials to comply with proportionality when using weapons that result in ERW); McDonnell, *supra* note 148, at 80 (pointing out that civilians have often been the main victims of dud cluster bombs because of their attractive color and size); Wiebe, *supra* note 152, at 88 (advocating for regulation of cluster munitions due to the devastation of NATO's use of CM's in Serbia and Kosovo); Breitegger, *supra* note 28, at 17 (asserting that post-conflict ERW's have an impact on civilian populations because casualties happen during ordinary activities such as farming, and not just direct handling of the munitions).

221. *See, e.g.*, Herthel, *supra* note 30, at 268 (confirming Major Thomas J. Herthel's view that military personnel should avoid the use thereof near populated areas unless there is a "direct military benefit that clearly outweighs the likely collateral damage . . . during and after the conflict").

222. *See, e.g.*, Hum. Rts. Watch, *Cluster Munitions and the Proportionality Test: Memorandum to Delegates of the Convention on Conventional Weapons 13* (April 2008) (proposing a legal instrument that bans "the production, transfer, stockpiling, and use of cluster munitions" due to their victimizing of civilians even after hostilities are over).

223. *See, e.g.*, HANDICAP INT'L, *FATAL FOOTPRINT: THE GLOBAL HUMAN IMPACT OF CLUSTER MUNITIONS*, PRELIMINARY REPORT 44-45 (2006) (noting that those long-term consequences include killed and maimed civilians, particularly children, which inhibited socio-economic recovery and created a resurgence of internal displaced persons and refugees); *see also* HUM. RTS. WATCH, *FLOODING*

international weapons instruments concerned with long-term impacts as well as the 1996 nuclear weapons case (in which few justices addressed long-term impacts), its supporters declared that: "Most in the international community now believe that the proportionality principle requires consideration of the aftereffects of a weapon, such as a cluster munition" ²²⁵

Given this state of affairs, when the Winograd Commission stated that "the most important issue at hand: the use of CMs must also take into account the injuries caused by duds, *long after the actual firing, and in some cases even after the end of the war*," ²²⁶ it significantly contributed to the case for the CCM or, at least, to formulating a prohibition against the use of CMs in and near populated areas. The Commission had, in effect, defined any CM strike on a populated area as indiscriminate under IHL. ²²⁷ Given Israel's position as a prominent CM weapons producer (60 million M-85 bomblets by 2002 in addition to license agreements with companies across the globe), exporter (through artillery shells) ²²⁸ and, most importantly, a heavy user (notably in 1973, 1978, 1982, and 2006), such a statement from an official commission should not be underestimated.

SOUTH LEBANON, *supra* note 63, at 49-82 (exposing the fact that many civilians returned to their homes in Lebanon after hostilities ended, unaware of submunition duds that were in their vicinity).

224. See Breitegger, *supra* note 28, at 14-19 (discussing the debate over whether long-term effects should be required to be taken into account as one that is about the subjective assessment of expected civilian losses and not actual civilian losses).

225. HUM. RTS. WATCH, CLUSTER MUNITIONS, *supra* note 227, at 12 (noting that the number of authorities who support this position is growing and that they contend that the use of CM's in populated areas can almost always be expected to cause civilian losses that are "excessive in relation to the . . . military advantage anticipated).

226. WINOGRAD REPORT, *supra* note 24, at 495 (emphasis in original).

227. See *Responses to Questionnaire*, *supra* note 222, at 19 (explaining that the exception is in cases when the military, which should bear the burden of proof, is able to show that the military advantage of this *particular* strike outweighed the civilian harm). As one response to the 2005-2006 survey stated: "The greater the importance of the military target, the greater the collateral damage allowed." *Id.*

228. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 27 (naming Israel as a major producer and exporter of cluster munitions through Israel Military Industries ("IMI"), which is a government-owned weapons manufacturer).

CONCLUSION

Above all, the 2006 Israeli use of CMs suggests that IHL's general principles are inadequate *per se* at preventing improper use of the weapon.²²⁹ Hence, a shift of attention is required away from the weapon's effects (primarily disproportionate civilian casualties) toward the weapon itself, as the CCM does. Nothing more is needed than Israel's insistence, justified or not, that CM use in the Second Lebanon War generally accorded with IHL to indicate that the existing law demands urgent remedy. Considering the number of possessor states that adopted the CCM by May 2008, the fact remains that some forty states possessing CMs still prefer to remain outside the purview of the Convention; as such, those states are bound solely by the general principles of IHL, and future improper massive use of CMs might be just a matter of time.²³⁰

Yet, a treaty over this specific weapon has existed since December 2008.²³¹ Although the issue of when it will enter into force is still an open question, the issue currently on the agenda is not whether specific rules on CMs should be devised to remedy the existing law but, rather, whether an absolute ban on use, possession, and so forth was needed.²³² Could use restrictions fill the gaps in existing law, as the United States claims?

Within this more limited framework, the 2006 case seems to support the ban model for three fundamental reasons going beyond the various shortcomings in the CM Draft Protocol addressed in this article. After all, some of the flaws in the current draft, important as they are, could be eliminated to some extent. It is also quite possible

229. Cf. *id.* at 24-25, 129-30 (concluding that use of cluster munitions binds states to minimize civilian harm, and that while Israel had made efforts to do so, it is still responsible for the suffering that it caused).

230. See HUM. RTS. WATCH, CLUSTER MUNITION INFORMATION CHART (2009), available at <http://www.hrw.org/en/news/2009/07/17/cluster-munition-information-chart> (naming countries, such as Iraq and Syria, that use cluster weapons but are not parties to the treaty and thus not subject to the treaty's specific principles).

231. See States Adopting the Convention on Cluster Munitions, *supra* note 1 (reporting that 107 countries adopted the convention on May 30, 2008).

232. See Suzanne Tice, *Cluster Munitions: The Ban Process*, J. OF MINE ACTION, Summer 2008, available at <http://maic.jmu.edu/journal/12.1/sp/tice/tice.htm> (summarizing the efforts to ban CMs and noting that certain countries wanted to have exceptions to the ban).

that the draft may not obtain the required consensus and be removed from the CCW agenda.²³³ In that case, however, the CCM opponents' contention that a total ban is an extreme measure compared to the previous restrictions (which allegedly could have allowed them to join while simultaneously addressing the respective humanitarian concerns) will gain much attention. Thus, the question becomes whether a modest model such as that embodied in Protocol III of the CCW on Incendiary Weapons (i.e., use of weapons is allowed only when special protection is given to civilian populations)²³⁴ can properly address future humanitarian crises.

The first and the most important reason for supporting the ban model embodied in the CCM is that, as Lesson Five indicates, Israel not only uses CMs, but also that its use of this weapon in the field is uncontrolled.²³⁵ On the one hand, approximately 4,000 rockets hit Israel's civilian population, with an average of 100 rockets launched daily, while on the other, more than 173,000 artillery projectiles and rockets were fired on South Lebanon, mainly to prevent first firings.²³⁶ Under the circumstances of the Second Lebanon War, one

233. *See id.* (pointing out that some states, such as the United States and Russia, will not agree to a strict approach to CMs).

234. *See* Hays Parks, *The Protocol on Incendiary Weapons*, 279 INT'L REV. RED CROSS 535, 550 (1990) (tracing the drafting history of the Protocol on Incendiary Weapons and concluding that there should also be rules for internal armed conflicts also); *see also* David P. Fidler, *The Use of White Phosphorous Munitions By U.S. Military Forces in Iraq*, ASIL INSIGHTS, Dec. 6, 2005, available at <http://www.asil.org/insights051206.cfm> (citing the international outcry whenever possible violations arise such as in the case of the U.S. use of phosphorous in Fallujah and Israel's use of the same in Operation Cast Lead in the Gaza Strip); *UN Accuses Israel Over Phosphorous*, BBC NEWS, Jan. 15, 2009, available at http://news.bbc.co.uk/2/hi/middle_east/7831424.stm (noting that white phosphorus sticks to human skin and burns to the bone, causing death or wounds that heal slowly); Amos Harel, *IDF Probes Improper Use of Phosphorous Shells in Gaza Strip*, HAARETZ, Jan. 23, 2009, <http://www.haaretz.com/hasen/spages/1057361.html> (reporting two incidents after a probe of improper phosphorous use: a strike on a UNRWA school bus that killed 42 Palestinians and a friendly fire event that killed two soldiers). *See also* Parks, *supra* note 249, at 544 (explaining that since white phosphorus is used extensively for marking and screening purposes, it was excluded from consideration as an incendiary).

235. HUM. RTS. WATCH, CLUSTER MUNITIONS, *supra* note 227, at 13 (concluding that a ban on all cluster munitions would best prevent future violations of international humanitarian law).

236. *Cf.* HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 40-41 (confirming Israel's likely use of indiscriminate and disproportionate attacks.)

might even retrospectively conclude that this exaggeration was unavoidable; yet, it was also too extreme to support any of the offered models.

However, during the war, politicians and IDF commanders alike were accompanied by an unprecedented number of legal advisers.²³⁷ As Israel's AG Mazuz detailed before the Winograd Commission, legal advisers from the MAG's office were present at all military decision-making forums (e.g., targets and sorties approval), including the Northern Command, the IAF, the Navy, and the General Staff.²³⁸ In fact, the legal accompaniment reached such a level that the Winograd Commission itself could not but ask "whether such an intense level of legal advising in real time is indeed desirable."²³⁹

Given the fact that the extensive use took place under such conditions,²⁴⁰ it appears that only the total elimination of CMs can prevent repetition of such practices in the next intensive conflict engaged in by CM-possessing states. As long as CMs remain integral parts of military arsenals, their highly perceived military utility, despite their gradual ineffectiveness as indicated by the Sixth Lesson above, legal advisers will labor to approve rather than prevent CM deployment in populated areas.²⁴¹

The second reason for supporting the ban model is related to the 1976 Bilateral End-Use Agreement between Israel and the United States. Due to this agreement, Israel faces severe restrictions on its

237. WINOGRAD REPORT, *supra* note 24, at 498; *cf.* Israeli Ministry of Foreign Affairs, *supra* note 204, ¶ 251 (confirming that legal advisors are always present when the IDF makes decisions).

238. *Mazuz to Winograd: IDF Acted in Accordance with International Law*, *supra* note 96.

239. WINOGRAD REPORT, *supra* note 24, at 488.

240. *See* HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 40-41 (documenting Israel's extensive bombing campaign).

241. *See* Yotam Feldman & Uri Blau, *Consent and Advise*, HAARETZ, Feb. 5, 2009, available at <http://www.haaretz.com/hasen/spages/1059925.html> (reporting that an officer in the International Law Division, the IDF MAG's Office, was quoted after the December 2008-January 2009 *Cast Lead Operation* as saying: "Our goal is not to fetter the army, but to give it the tools to win in a lawful manner," and also reporting that Prof. Orna Ben-Naftali even stated: "Today, this discipline [international law] is utilized only to justify the use of force . . . Instead of legal advice and international humanitarian law minimizing suffering, they legitimize the use of force.").

use of CMs, restrictions which are much more stringent and specific than the rules entered into the CM Draft Protocol to prevent future IHL violations.²⁴² While an assessment of the diplomatic entanglement caused in the wake of the 2006 War is beyond the scope of this article,²⁴³ we can state in a nutshell that one of the conditions to be met when resorting to U.S.-made CM use is stipulation of "military, fortified targets."²⁴⁴

While it is doubtful that Israel's use of U.S.-made CMs (to be differentiated from a few cases of improper targeting) did violate the Agreement's terms, the crucial fact is that use restrictions, albeit from a bilateral rather than a multilateral source, did nothing to prevent the humanitarian crisis.²⁴⁵ There can be little hope, therefore,

242. See GGE-CCW, *Draft Protocol on Cluster Munitions*, *supra* note 17, art. 3 (providing for the protection of civilians, the civilian population, and civilian objects). In fact, while even earlier drafts (e.g., July and October 2008), which contained up to nine paragraphs on IHL, were criticized as "merely regulat[ing] the weapon and . . . not go[ing] far enough to minimize humanitarian harm," see HUMAN RIGHTS WATCH, OBSERVATIONS, *supra* note 17, at 4 (reviewing the July 2008 draft), in the latest draft (November 2009), there are only two paragraphs reiterating IHL. The paragraphs state that in implementing this Protocol, members which are parties to an armed conflict "shall ensure full compliance" with all applicable principles and rules of IHL and that nothing in it "shall be interpreted as detracting from, or otherwise prejudicing," other principles and rules of IHL. GGE-CCW, *Draft Protocol on Cluster Munitions*, *supra* note 17, art. 3.

243. For a review of the entire affair as well as the agreement's origins, history and diplomatic crises caused over the use of U.S.-made CMs by Israel see Barak, *supra* note 93.

244. See Don Oberdorfer, *Cluster Bomb Curb Sought in Mideast; U.S. Asks Israel to Tighten Curbs On Deadly Cluster Bomb Units*, WASH. POST, Apr. 13, 1978, at A1 (reporting that one of the conditions sought was that field commanders would not use the weapons without decisions made by politically responsible superiors); see also David S. Cloud, *Inquiry Opened into Israeli Use of U.S. Bombs*, N.Y. TIMES, Aug. 25, 2006, at A1 (describing that the first sales of weapons occurred in the 1970's but were never publicly confirmed); RICHARD MOYES & THOMAS NASH, CLUSTER MUNITIONS IN LEBANON 9 (Simon Conway ed., 2005) (summarizing the conditions imposed as: "only for defensive purposes, against fortified military targets, and only if attacked by two or more 'Arab states.'").

245. See HUM. RTS. WATCH, FLOODING SOUTH LEBANON, *supra* note 63, at 17 (urging the United States to stop supplying most of the cluster munitions and other weapons that Israel used in Lebanon due to the civilian casualties); see also Mark Tran, *US Studies Israel's Cluster Bomb Use in Lebanon*, GUARDIAN, Jan. 29, 2007, [available at](http://www.guardian.co.uk/world/2007/jan/29/israelandthepalestinians.usa) <http://www.guardian.co.uk/world/2007/jan/29/israelandthepalestinians.usa> (noting that the United States had begun an investigation into whether Israel had violated

that a different restriction model coming from within or outside the CCW framework will have greater effect on Israel should it join (and certainly should it abstain from joining) a would-be protocol on CMs.

The third, somewhat less urgent reason refers to an argument commonly used by CCM supporters: the concern that CM proliferation beyond current possessor states will “include . . . non-state actors.”²⁴⁶ Moreover, as one CMC co-chair stated, if even a small portion of the billions of sub-munitions currently in world arsenals get used, “they could make the landmine crisis pale in comparison.”²⁴⁷ In this respect, the Second Lebanon War proved that such proliferation is already here: Although not addressed by the current article, there is conclusive evidence of CM use²⁴⁸ by Hezbollah during the war.²⁴⁹ Hezbollah’s use, which inflicted one

usage agreements while using the cluster bombs in 2006).

246. See HUM. RTS. WATCH, STAYING TRUE TO THE BAN ON CLUSTER MUNITIONS 5 (2009), available at <http://www.hrw.org/en/news/2009/06/22/staying-true-ban-cluster-munitions> (advocating broad language in international law that prevents states or companies from assisting non-state actors from acquiring aid for CM’s or using them).

247. Steve Goose, Dir., Arms Div., Hum. Rts. Watch, Cluster Munitions: Statement to the Canadian Standing Committee on Foreign Affairs and International Development (Mar. 1, 2007), available at <http://www.hrw.org/en/news/2007/03/01/cluster-munitions-statement-canadian-standing-committee-foreign-affairs-and-internat> (“We believe that the military utility of cluster munitions has been overstated while the military dangers . . . have been understated.”).

248. See Press Release, Hum. Rts. Watch, Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict, Oct. 18, 2006, available at <http://www.hrw.org/en/news/2006/10/18/lebanonisrael-hezbollah-hit-israel-cluster-munitions-during-conflict> (documenting Hezbollah’s use of 118 Chinese-made Type-81 122mm unguided rockets containing 39 bomblets each. These bomblets (called Type-90s or MZDs) are dual-purpose: Once they explode on impact for a blast effect, they fragment into hundreds of steel spheres about 3.5 mm in diameter over a wide area. [A reliable HDR for these bomblets is unavailable]); see also Mine Action Info. Ctr. at James Madison Univ., *Munitions Reference*, <http://maic.jmu.edu/journal/supplemental/munitions/munitions.asp> (last visited May 14, 2010) (providing lists of different types of weapons and their functions).

249. See, e.g., Press Release, Hum. Rts. Watch, *supra* note 252. (noting that the Israeli government was reluctant to confirm Hezbollah CM attacks because of security concerns); see also *Hezbollah Used Cluster Bombs, Groups Assert*, L.A. TIMES, Oct. 20, 2006, at A10 (citing the Human Rights Watch report on Hezbollah’s CM use and reporting that three civilians were injured in a particular attack in July near Maghar).

death and twelve injuries in Israel, provides an additional incentive to ban CMs or, at least impose heavy restrictions on their transfer.²⁵⁰

Indeed, historically, banning a weapon has not guaranteed its total destruction.²⁵¹ Regardless of the intrusiveness of the legal instrument applied, states can always develop and/or maintain a hidden arsenal.²⁵² Banning does ensure, however, that the banned weapon is, at minimum, outside the reach of regular combat units when a bitter conflict erupts, making it impossible for the alleged arsenal to be used other than as a last resort.

As to those states deciding to refrain from joining the CCM, its very existence may strongly reinforce or generate an international norm prohibiting CMs. Through de-legitimization, that norm will affect non-CCM members before they resort to large-scale use of CMs, especially against targets in populated areas. The constructivist literature has already demonstrated (for example, in reference to chemical weapons and anti-personnel landmines) that international treaties, or even deliberation about international treaties, on some categories of weapons can result in their stigmatization.²⁵³

250. See HUM. RTS. WATCH, CIVILIANS UNDER ASSAULT: HEZBOLLAH'S ROCKET ATTACKS ON ISRAEL IN THE 2006 WAR 44-46 (Aug. 2007) (providing that the death and 12 injuries are confirmed through police reports along with police reports confirming bombs landing in Haifa); Alia Ibrahim, *Report Accuses Hezbollah of Indiscriminate Attacks on Civilians in '06 War*, WASH. POST, Aug. 30, 2007, at A15 (reporting that Hezbollah and the Lebanese government strongly condemned the Human Rights Watch report.) Due to the attention devoted to Israeli use of CMs, the implications of Hezbollah's use were almost totally ignored.

251. See CCM, *supra* note 2, art. 3(6) (permitting possession of a limited number of CMs and explosive sub-munitions for the development of and training in CM and explosive sub-munition detection, clearance, or destruction, and development of CM counter-measures).

252. See, e.g., Ken Alibek & Stephen Handelman, *Biohazard: The Chilling Story of the Largest Covert Biological Weapons Program in the World-Told from the Inside By the Man Who Ran It* (1999) (considering the Iraqi case regarding nuclear weapons and the Soviet case regarding biological weapons and remarking, "[o]ver a twenty-year period that began, ironically, with Moscow's endorsement of the Biological Weapons Convention [BWC] in 1972, the Soviet Union [one of the three BWC depository states] built the largest and most advanced biological warfare establishment in the world.").

253. See Richard Price & Nina Tannenwald, *Norms and Deterrence: The Nuclear and Chemical Weapons Taboos*, in THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 114-52 (Peter J. Katzenstein ed., 1996) (providing a succinct analysis of the chemical weapons case and

CCM supporters have openly stated that they hope that such stigmatization will occur with CMs.²⁵⁴ In 1996, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), while reviewing a case in which CM rockets (Orkan M-87)²⁵⁵ were fired into Zagreb, noted that there was nothing in IHL formally forbidding the use of CMs as such.²⁵⁶ A decade later, many states still perceive CMs as legitimate although the winds have changed.²⁵⁷ As the AP mines case (which inspired the participants of the Oslo Process) indicates, delegitimization will eventually occur.²⁵⁸ In a move which

commenting that the most important effect of international taboos is that they delegitimize weapons and the practice of self-help); Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT’L ORGS. 613, 640 (1998) (analyzing the process prior to the entry into force of the treaty on AP landmines and concluding that new norms regarding landmines are likely to affect policymakers’ decisions); BRIAN RAPPERT, A CONVENTION BEYOND THE CONVENTION: STIGMA, HUMANITARIAN STANDARDS AND THE OSLO PROCESS 8-9 (Richard Moyes ed., 2008) [hereinafter RAPPERT, A CONVENTION BEYOND THE CONVENTION] (summarizing the recent studies on this case and explaining that delegitimization helps countries make progress regarding regulation of landmines even if they are not state parties to any Conventions).

254. See Minister Micheál Martin, Statement at Closing Ceremony of the Dublin Diplomatic Conference on Cluster Munitions (May 30, 2008), *available at* <http://www.clustermunitionsdublin.ie/pdf/Ireland.pdf> (“[E]ven though we all know that there are important states not present, I am also convinced that together we will have succeeded in stigmatizing any future use of cluster munitions.”).

255. See JANE’S AMMUNITION HANDBOOK 660 (Anthony G. Williams & Leland Ness eds., 14th ed. 2006) (providing weapon specifications).

256. See Prosecutor v. Milan Martić, Case No. IT-95-11-R61, Decision, ¶ 18 (Mar. 8, 1996), *available at* <http://www.un.org/icty/transel1/R61/960308IT.htm> (finding, however, that the specific rocket used was an indiscriminate weapon; Prosecutor v. Milan Martić, Case No. IT-95-11-T, Judgment, ¶ 463, 468 (June 12, 2007), *available at* <http://www.un.org/icty/martic/trialc/judgement/martjud070612e.pdf> (holding that Martić, the former political leader of Croatian Serbs, ordered, *inter alia*, the shelling of Zagreb on May 2-3, 1995.); see also Prosecutor v. Milan Martić, Case No. IT-95-11-A, Public Judgment, ¶ 252 (Oct. 8, 2008), *available at* <http://www.un.org/icty/martic/appeal/judgment/maraj081008e.pdf> (dismissing the appeal and confirming the sentence while sustaining the Trial Chamber’s finding that the M-87 Orkan—as used under the circumstances of the case—was an indiscriminate weapon and that Martić knew of the effects of this weapon when he ordered the shelling).

257. See Tice, *supra* note 232 (reporting that the United States and Russia have historically been opposed to banning cluster bombs although they seem to be leaning towards favoring regulation).

258. See Editorial, *Cluster Bombs, Made in America*, N.Y. TIMES, June 1, 2008, at 11 (commenting on the U.S. administration’s opposition to the CCM but also

bears important implications for the current debate over the weapons' legitimacy, Hezbollah Lebanese MP Hassan Hoballah, although refusing to address specific queries regarding whether Hezbollah indeed used CMs, stated in an interview with the BBC that: "We did not use these bombs . . . [w]e reject the use of these bombs anywhere in the world because they hurt civilians, especially when dropped on residential areas. Our stance is consistent. It can never change."²⁵⁹

This development has not been overlooked by CCM opponents²⁶⁰ and—as many supporters believe—provides an important impetus to concluding the Draft Protocol. Yet, while the CCM seeks to delegitimize this weapon, the would-be effect of the Draft Protocol is exactly diametrical.²⁶¹ This is the core of the dispute. In light of the perceived effectiveness of the CM (especially in comparison with the one attributed to AP landmines) a prolonged battle is expected. As the Head of the U.S. delegation assiduously clarified during the November 2008 session of the GGE on CMs: "Again, let me be perfectly clear here, on the 4th of December, after the signing ceremony of Oslo, cluster munitions will still remain as lawful and legitimate weapons."²⁶²

Finally, it is hard to find more favorable circumstances for responsible use of CMs than a professionally trained and modern

saying, "At least this treaty, like the land-mine ban, will stigmatize cluster munitions and make it harder to use them"); RAPPERT, A CONVENTION BEYOND THE CONVENTION, *supra* note 253, at 3 (mentioning NATO's policy of no-use of CMs in Afghanistan as evidence of other efforts made to avoid CM usage); Borrie, *supra* note 7, (using Brazil's review of its national positions with a view to joining the CCM as an example of progress).

259. *Hezbollah Denies Cluster Bomb Use*, BBC NEWS, Oct. 19, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/6068154.stm; see HUM. RTS. WATCH, CLUSTER BOMBS IN AFGHANISTAN: A HUMAN RIGHTS WATCH BACKGROUNDER 2 (Oct. 2001), available at <http://www.hrw.org/en/reports/2001/10/31/cluster-bombs-afghanistan> (pointing out that the Northern Alliance in Afghanistan and the Serb militia in Croatia, see *supra* note 258, have used CMs as well.)

260. See Peter Beaumont, *Obama Takes U.S. Closer to Total Ban on Cluster Bombs*, GUARDIAN, Mar. 13, 2009, available at <http://www.guardian.co.uk/world/2009/mar/13/us-national-security-obama-administration/print> (noting that Obama signed a new law making it virtually impossible to sell the weapons).

261. See *id.* (stating that the United States will still continue to use cluster weapons even though Obama had seemingly made progress on its ban).

262. Mathias, *supra* note 54.

army that has legal advisors, knowledgeable in IHL and weighing in on each relevant decision. In fact, as AG Mazuz stated before the Winograd Commission: “It was the most legislated war in the history of Israel, maybe the world.”²⁶³ If a loss of control transpired even in such favorable circumstances, it seems that no country is to be trusted with the proper use of CMs once it becomes involved in a bitter military conflict. The failure of Israel’s intensive legal control of military operations during the Second Lebanon War to provide adequate protection to Lebanese civilians should warn us that many more cases of severe post-conflict civilian harm will occur in the absence of strong, viable use prohibition. However, these will probably, as the Sixth Lesson on the ineffectiveness of CMs in this War suggests above, be of no avail whatsoever.

263. *Mazuz to Winograd: IDF Acted in Accordance with International Law*, *supra* note 96; see Yuval Azoulay, *Mazuz: Ample Legal Advice During War*, HAARETZ, Oct. 17, 2009, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=936011> (asserting that there was enough legal advice in officers’ deliberations before military operations).